Indian Claims Commission

Kawacatoose First Nation

Report on: Treaty Land Entitlement Inquiry

MARCH 1996

Indian Claims Commission

Commission des revendications des Indiens

102-02525/

March 7, 1996

Chief and Council
Kawacatoose First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Kawacatoose First Nation
Treaty Land Entitlement

The Kawacatoose First Nation initiated proceedings before this Commission by letter dated March 28, 1994, from Stephen Pillipow, Counsel for the Kawacatoose First Nation, to the Commissioners of the Indian Claims Commission. On May 17, 1994, the Commission advised the Government of Canada and the Chief and Council of the Kawacatoose First Nation that it would conduct an inquiry into the Government's rejection of the specific claim of this First Nation.

This inquiry deals with the issue of outstanding treaty land entitlement pursuant to Treaty 4, for the Kawacatoose First Nation in Saskatchewan. The Commission has reviewed over 1000 pages of documents related to this inquiry. In addition to this review, the Commission held an information gathering session at Kawacatoose on November 15, 1994, where we heard directly from the elders. Four expert sessions were held on the following dates: November 15, 1994, November 18, 1994, December 16, 1994 and May 24-25, 1995. On October 24, 1995, the Commissioners heard oral submissions from counsel for the parties on the legal issues raised in this inquiry.

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As set out in Recommendation 3 in the Commission's Annual Report for 1994/95, we will be arranging for a meeting of the parties to respond to this Report within 90 days of the date of this letter. The government response should contain detailed reasons for the acceptance or rejection of our recommendation and include a precis of any fresh legal opinion received from the Department of Justice.

Our review of the history of this claim, and our analysis, findings, and recommendations are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC
Commission Co-Chair

Roger Augustine
Commissioner

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE KAWACATOOSE FIRST NATION

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March 1996

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EXECUTIVE SUMMARY

The Commission has been asked to examine and report on whether the Government of Canada properly rejected the specific claim submitted by the Kawacatoose First Nation. The Kawacatoose First Nation adhered to Treaty 4 on September 15, 1874. Its reserve, Indian Reserve 88, located in the Touchwood Hills approximately 100 kilometres north of Regina, was surveyed in 1876. According to the formula contained in Treaty 4 of 128 acres per person, enough land was surveyed for 212 people: 27,200 acres. For a number of reasons, Kawacatoose argues that it is entitled to more land under the terms of Treaty 4 than it has received. The Kawacatoose claim therefore falls into the category of treaty land entitlement (TLE) claims.

This claim is both very simple and extraordinarily complex. The calculation to determine how much land an Indian band is entitled to under treaty is theoretically straightforward: (number of band members) x (acres per person) = TLE. This simple calculation is complicated by a number of problems: when is the calculation to be done; how many times is it to be done; who should be included as a member of the band; what happens if Treaty Indians join the band after the reserve has been surveyed; what happens if insufficient land is surveyed in the first instance; what happens if the band's population *increases* after the reserve is surveyed; and what happens if the band's population *decreases* after the reserve is surveyed? Add to this list the fact that we are dealing with a problem that, in 1996, is 120 years old, and that the past practices of both Canada and First Nations towards resolving these problems have been inconsistent at best, and the complexity of the problem becomes clear. As will be evident from Part III of this Report, the history of treaty land entitlement in Saskatchewan is particularly complex.

This claim is further complicated because there is no agreement between Canada and the First Nation as to either the facts or the law. We must then make findings with respect to both. The parties did at least agree on the three issues before the Commission in this claim, and they are set out in full in Part II.

ISSUE 1: DATE- OF- FIRST-SURVEY POPULATION

The first issue is a factual one relating to the question of who were members of the Kawacatoose Band in the year of survey and thereby entitled to be included in the TLE equation. Two of the families that were paid treaty money or annuities at Fort Walsh in 1876 had the names of Long Hair (Paahoska) and Man That Runs (Wui Chas te too tabe). At that time, there were two bands with a similar name, Kawacatoose ("Poor Man Band") and the Lean Man ("Poor Man"). Kawacatoose is a Cree First Nation, and Lean Man is Assiniboine. It is reasonably clear that these two families were stragglers from one of these bands, but which one? Thirteen individuals were paid as members of these two families and, if they were in fact members of the claimant Kawacatoose, they ought to have been included in its TLE calculation. They were not.

The documentary evidence on this first issue was unclear, but the elders from Kawacatoose were very clear; they presented a compelling case that Long Hair and Man That Runs were members of Kawacatoose. After a close analysis of the evidence, we accept the evidence of the elders and find that the 13 members of the two families paid at Fort Walsh in 1876 under the heading "Poor Man" were members of Kawacatoose, and not the Assiniboine Poor Man Band. This is a key finding to the submission of Kawacatoose because, other considerations aside, it would mean that the First Nation has what is known as a "date-of-first-survey (DOFS) shortfall": that insufficient land had been surveyed for the number of band members at the time of

survey, thereby making a valid claim based on Canada's present policy considerations. This point is dealt with under Issue 2.

However, we also find that five individuals in the Contourier family, who in 1883 were paid arrears for 1876 with Kawacatoose, had already been included in the TLE calculation for Gordon's Band and could not be counted a second time with Kawacatoose. After examining all the evidence that was presented about band membership, we have concluded that the DOFS population for Kawacatoose is 210, subject to further research that may be undertaken. Since sufficient land was surveyed for 212 people, we find that there was no DOFS shortfall in the calculation of the reserve for Kawacatoose.

ISSUE 2: TLE OBLIGATIONS PURSUANT TO TREATY 4

The second issue relates to treaty interpretation and to matters of law. Simply put, the issue is whether certain Treaty Indians who became members of Kawacatoose *after* the date of first survey give rise to an additional obligation on the part of Canada to set aside more reserve land on their account. The people in question fall into two groups: Treaty Indians who adhered to treaty after 1876 and then became members of Kawacatoose, and Treaty Indians who transferred into Kawacatoose from another band that had never had a TLE calculation and survey done at the time of the transfer. The first group are known as late adherents the second as landless transfers. Women who marry into the band can also be included in these groups, but only if they are also either late adherents or landless transfers in their own right.

Since 1993 it has been Canada's position that a DOFS shortfall is an absolute prerequisite to a valid TLE claim and that no number of late adherents or landless transfers alone can open up the issue for recalculation. Canada will provide land for

landless transfers and/or late adherents, but only if there was also a shortfall at date of first survey. The importance of the membership of the two families paid at Fort Walsh now becomes very clear: but for the problem with the Contourier family, the inclusion of those 13 band members would have resulted in a DOFS population of 215 members and a shortfall of land for three persons - resulting in a valid claim by Canada's method of calculation. In addition, Canada would have provided compensation for more than 70 members, since, by Canada's admission, there were 67 landless transfers and late adherents added to Kawacatoose after the reserve was surveyed in 1876.

However, as we found in the *Report on the Treaty Land Entitlement Claim of the Fort McKay First Nation* in Alberta, released in December 1995, we do not agree with Canada's assertion that treaty land entitlement must be based on a date-of-first-survey shortfall.

We find that the relevant provisions of Treaty 4 are very similar to the terms of Treaty 8, the treaty in question in the Fort McKay report. Although the factual circumstances of the Kawacatoose and Fort McKay First Nations differ somewhat, we conclude that they were alike in certain key respects: at the time of treaty, neither band had become a stable, self-contained unit, and it was recognized that many Indians, for some time to come, would not adhere to treaty, give up the traditional hunting way of life, move onto reserves, and become farmers.

Canada's interpretation of treaty means that those Treaty Indians who join a band after the date of first survey would never have any land set aside for them under the treaty unless there had been a miscalculation when the survey was done and there was a DOFS shortfall. Then, and only then, would late adherents and landless transfers have land surveyed on their behalf. We cannot believe that this outcome was understood, let alone agreed to, by the First Nation signatories to the treaty. For these reasons, we

cannot reasonably conclude that the members of Kawacatoose, or any of the signatories of Treaty 4, would have been prepared to cede their rights to the huge area of land covered by the treaty on the basis of the rigid DOFS population approach that Canada has argued represents the full extent of its lawful obligation. We make the following central finding, as we did in the Fort McKay report:

> The purpose, meaning, and intent of the treaty is that each Indian band is entitled to a certain amount of land based on the number of members, and each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band.

As a result, Canada has not satisfied its treaty obligation to provide the requisite amount of reserve land to the Kawacatoose First Nation. Although Canada did survey sufficient land for the membership of Kawacatoose in 1876 when the reserve was first surveyed, the treaty also entitled the band to receive additional reserve land for every Treaty Indian who adhered to the treaty and joined Kawacatoose subsequent to the date of first survey. The amount of additional land that Kawacatoose is entitled to as a result of new adherents is a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the band. We find that a total of 43 individuals joined Kawacatoose as new adherents to treaty following the date of first survey, but, since neither party has expressed complete confidence in the numbers submitted by it or researched on its behalf, this figure is subject to such further research as the parties may agree to.

In addition, the treaty entitled Kawacatoose to receive additional reserve land for every Indian who transferred from one band to another, where the band from which that Indian transferred had not yet had a TLE calculation and survey done. There were 19

landless transfers to Kawacatoose, although this number is again subject to further research as agreed by the parties.

Finally, as a result of marriages, five women who were either new adherents or landless transfers in their own right became members of Kawacatoose. As with the preceding figures for new adherents and landless transfers, this number is also subject to further research.

As a result, we have concluded on a preliminary basis that the First Nation's treaty land entitlement claim, including individuals on the base paylist, absentees and arrears, new adherents, and landless transfers, should be as follows:

1876 base paylist	146
Fort Walsh families	13
Contourier family	0
Absentees and arrears	51
New adherents	43
Landless transfers	19
Eligible in-marrying women	5
TOTAL	**277**

This figure gives rise to a treaty land entitlement of 35,456 acres. When the first survey area of 27,200 acres is set off against this treaty land entitlement, the Kawacatoose First Nation is owed an additional 8526 acres, or 13.32 square miles.

ISSUE 3: THE 1992 SASKATCHEWAN FRAMEWORK AGREEMENT

The third issue has to do with the 1992 Saskatchewan Framework Agreement and whether that agreement gives rise to a separate legal right for Kawacatoose to have its treaty land entitlement claim validated. Part III and Part IV of this Report outline the

complex details of the history of this agreement and its contents. The Framework Agreement emerged from: (a) the failure of the 1976 Saskatchewan Agreement; (b) and the subsequent court action brought on behalf of the Saskatchewan First Nations that had been accepted for negotiation of treaty land entitlement claims pursuant to that agreement; and (c) the 1990 report and recommendations of the Office of the Treaty Commissioner for Saskatchewan. That Office had developed the "equity formula" as a fair and equitable means of resolving the outstanding treaty land entitlement claims of the Entitlement Bands.

The Framework Agreement was executed by Canada and the Province of Saskatchewan on September 22, 1992. The 26 Entitlement Bands, the Saskatchewan First Nations whose TLE claims had been validated by Canada, are also signatories to the agreement. Under the terms of the agreement, Canada and Saskatchewan agreed to pay on a cost-shared basis the sum of $503 million over a period of 12 years, to enable the Entitlement Bands to acquire up to 1.7 million acres of land with reserve status, and to compensate rural municipalities and school divisions for tax losses.

In determining the area of land owed to each Entitlement Band under the terms of the Framework Agreement, the band's adjusted-date-of-first-survey (ADOFS) population forms the basis of the calculation. The final ADOFS population for each Entitlement Band was negotiated and agreed upon by Canada and the band. Mr. Rem Westland, then Director General of Specific Claims for Canada, confirmed to the Commission that the ADOFS population in the context of the Saskatchewan Framework Agreement comprises the DOFS population, new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women.

Issue 3 has been brought before this Commission because of an abrupt policy reversal that occurred in 1993. For at least a decade, from 1983 to 1993, TLE claims

were researched, submitted, validated, and negotiated on the basis of the "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" (the ONC Guidelines), prepared in May 1983 by Canada. Those guidelines offered a reasonable basis on which to achieve closure to TLE claims and included late adherents, landless transfers, and in-marrying women for validation purposes. In 1993 the Government of Canada revoked the guidelines and adopted a more restrictive interpretation of its obligation to the descendants of the Indians who signed the numbered treaties - the DOFS shortfall approach mentioned above.

Kawacatoose had begun to research its TLE claim in 1991, and had been provided with a copy of the ONC Guidelines by Canada to assist in preparing its claim submission. In April 1992 Kawacatoose wrote to Canada claiming an outstanding TLE obligation for additional reserve land, based on the ONC Guidelines. In September 1992 the Framework Agreement was signed, with Kawacatoose still not having received word from Canada on its TLE claim. In January 1994 Canada advised counsel for Kawacatoose of the preliminary federal position that there was no DOFS shortfall in the land surveyed for the First Nation.

Since the paylist analysis prepared for Kawacatoose had been based on the ONC Guidelines, the preliminary rejection of the claim came as a surprise to the First Nation. Meetings were quickly convened between representatives of the First Nation and the Department of Indian Affairs and Northern Development's (DIAND) Treaty Land Entitlement Branch on February 1, 1994, and between Chief Richard Poorman and the Minister of Indian Affairs and Northern Development, the Honourable Ron Irwin, on February 9, 1994.

In these meetings it was explained to the First Nation that, since 1993, the treaty land entitlement process involves two steps. The first step is the validation of a First

Nation's claim based on the DOFS population shortfall, which included the base paylist figures together with absentees and arrears but excluded late adherents, landless transfers, and in-marrying women. Once the First Nation has satisfied DIAND that there was a DOFS population shortfall, the second step is DIAND's acceptance of the claim for negotiation and settlement. Only in the second, settlement phase is DIAND prepared to consider the three additional categories of people so as to arrive at a mutually agreeable settlement of the claim. On February 15, 1994, Canada's rejection of its TLE claim was conveyed in writing to Kawacatoose.

In the course of this inquiry, Canada's own officials admitted that if Kawacatoose had submitted its claim earlier, it would have been validated pursuant to the ONC Guidelines and would most likely be an Entitlement Band today. In addition, we find that a number of Entitlement Bands had their TLE claims *validated* solelyon the basis of post-DOFS additions alone to band membership, meaning there was no DOFS shortfall involved in those TLE claims. In contrast, the 1993 reversal of policy has left Kawacatoose with a rejected claim and an inquiry before our Commission.

What Kawacatoose is claiming in Issue 3 is that Canada is obliged by the terms of the Framework Agreement itself to validate its TLE claim, despite the reversal of policy, because other bands had their claims validated on similar facts to those of Kawacatoose. The First Nation is also arguing that Canada is obliged to provide the same levels of compensation as are afforded pursuant to the Framework Agreement.

In our Report we find that the Framework Agreement itself does not give non–Entitlement Bands an independent basis for validation. We do not agree with the First Nation's submissions that the terms of section 17.03 of the Framework Agreement impose a fiduciary or contractual obligation on Canada to accept the Kawacatoose

claim for negotiation, or that Canada is estopped from denying an obligation to validate that claim.

Under Issue 2 we concluded that Kawacatoose has substantiated its claim for outstanding treaty land entitlement on the same basis as the Entitlement Bands – that is, in accordance with the terms of Treaty 4. Once validation of the claim of a non–Entitlement Band has occurred, as we recommend Canada do in the present case, section 17.03 would apply. This section stipulates that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Framework Agreement to bands whose claims have been validated. This obligation was acknowledged by both the solicitor who negotiated the Framework Agreement on Canada's behalf and present counsel for Canada.

Although Kawacatoose is not a party to the Framework Agreement and is not in a position to enforce the obligations of Canada and Saskatchewan under section 17.03, we take from Canada's submissions regarding the high degree of importance it attaches to its obligations under the Framework Agreement that it will consider itself honour bound to fulfil the obligations to non–Entitlement Bands set forth in section 17.03. Should Canada fail to live up to its obligations in that section, we expect that the Entitlement Bands, as the parties who sought and obtained that contractual term, would be able to enforce the provision, and we note that those bands have already endorsed a resolution in support of Kawacatoose and other First Nations with outstanding treaty land entitlement claims.

RECOMMENDATIONS

Having found that the land entitlement of the Kawacatoose First Nation has not been fully satisfied in accordance with the terms of Treaty 4, we therefore make the following recommendations:

1 **That the treaty land entitlement claim of the Kawacatoose First Nation be accepted for negotiation under Canada's Specific Claims Policy.**

2 **In accordance with section 17.03 of the Saskatchewan Framework Agreement, that Canada and Saskatchewan support the extension of the principles of settlement contained in that agreement to the Kawacatoose First Nation in order to fulfil the outstanding treaty land entitlement obligations to the First Nation.**

PART I

THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[1]

This is an inquiry into a claim which was rejected by the Minister of Indian Affairs. The claimant is the Kawacatoose First Nation ("Kawacatoose" or the "First Nation"), which, at the time it adhered to Treaty 4 on September 15, 1874, was also referred to as the "Poor Man" Band. Indian Reserve (IR) 88, comprising an area of 42.5 square miles (27,200 acres)[2] located in the Touchwood Hills approximately 100

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1 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference, ICC Exhibit 5, Tab 3).

2 Surveyor William Wagner's field book states that the reserve measured "27,040 acres," which translates to 42.25 square miles (c. September 1, 1876, in DIAND, Land Registry,

kilometres north of Regina, was surveyed for the First Nation in September 1876. This reserve was confirmed by Order in Council on May 15, 1889.[3]

The claim came before the Commission in the following manner. In response to a request from Kawacatoose for information to assist the First Nation in developing a claim for outstanding treaty land entitlement, Janine Dunlop of the Department of Indian Affairs and Northern Development (DIAND) provided the First Nation on May 13, 1991, with two key documents before the Commission in this inquiry: Kawacatoose's treaty annuity paylists for 1875 and 1876, and a paper produced by DIAND's Office of Native Claims (ONC) in May 1983 entitled "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" (1983 ONC Guidelines).[4] The First Nation was also encouraged to contact the Federation of

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Field Book #684, microbook 1247, ICC Documents, p. 53). This is the acreage on which the Kawacatoose claim submission as based in April 1992 (Stephen Pillipow, Pillipow & Company, Saskatoon, to Al Gross, Treaty Land Entitlement, Dept. of Indian Affairs, April 15, 1992, ICC Documents, pp. 240-41). The actual survey plan (c. September 1, 1876, ICC Documents, p. 54) shows the area as 27,040 acres, whereas the Order in Council confirming the reserve (May 17, 1889, ICC Documents, p. 161) gives the acreage as "42.5 square miles," which translates into 27,200 acres. In February 1994 Canada undertook to review the evidence relating to reserve size and on May 18, 1994, wrote that "further research has confirmed that the band received 27,200 acres of reserve land" (A.J. Gross, Director, Treaty Land Entitlement, DIAND, to Chief Richard Poorman, Kawacatoose Band, May 18, 1994, ICC Documents, p. 407). At the ICC Planning Conference in July 1994, counsel for Kawacatoose "stated that he was not in a position to comment on whether Canada's research was correct but that for the present purposes we could proceed on the presumption that it was" (Planning Conference Summary, July 8, 1994, ICC file 2107-15-1).

3 Order in Council PC, May 17, 1889 (ICC Documents, pp. 157-61).

4 DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, pp. 213-17).

Saskatchewan Indian Nations (FSIN) for additional information and assistance in developing the claim.[5]

On April 15, 1992, counsel for Kawacatoose wrote to Al Gross, DIAND's Director of Treaty Land Entitlement, enclosing a summary of paysheet analysis for the First Nation, an authorizing Band Council Resolution, and a report dated March 1992 by Steven Sliwa regarding the date of first survey (DOFS) for Kawacatoose.[6] Counsel contended that, based on these materials, the First Nation had been allocated less land than it was entitled to receive under the terms of Treaty 4, and therefore had an outstanding treaty land entitlement. Mr. Gross was requested to review the information regarding its accuracy and, upon confirmation, to commence negotiations immediately to settle the outstanding claim.

This letter was forwarded to Mr. Gross in the context of the ongoing negotiations which ultimately led to the execution on September 22, 1992, of the Saskatchewan Treaty Land Entitlement Framework Agreement. The parties to the Framework Agreement were Canada, the Province of Saskatchewan, and those 26 Saskatchewan First Nations (known as Entitlement Bands) whose claims for outstanding treaty land entitlement (TLE) under the terms of Treaties 4, 6, or 10 Canada had, prior to the date of the Framework Agreement, "accepted for negotiation" or "validated."[7] Kawacatoose

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5 Janine Dunlop, Claims Analyst, Specific Claims Branch, DIAND, to Bill Strongarm, Kawacatoose Band, May 13, 1991 (ICC Exhibit 34).

6 The letter dated April 15, 1992, and its enclosures are found at ICC Documents, pp. 232-48. The report by Steven Sliwa is entitled "Kawacatoose Band #88 Date of First Survey" (Federation of Saskatchewan Indians, March 1992).

7 The 26 original Entitlement Bands were the Keeseekoose, Muskowekwan, Ochapowace, Okanese, Piapot, Star Blanket, Yellowquill, Beardy's & Okemasis, Flying Dust, Joseph Bighead, Little Pine, Moosomin, Mosquito Grizzly Bear's Head, Muskeg Lake, One Arrow, Onion Lake, Pelican Lake, Peter Ballantyne, Poundmaker, Red Pheasant, Saulteaux,

sought to have its claim accepted for negotiation so that it too could qualify as an Entitlement Band under the Framework Agreement. However, its claim for outstanding TLE was not accepted for negotiation prior to the execution of the Framework Agreement and, today, Kawacatoose remains without status as an Entitlement Band.

Based on the analysis in the Sliwa report, counsel for Kawacatoose identified the year 1876 as the First Nation's date of first survey and the 1876 treaty annuity paylist as the appropriate "base paylist" upon which the initial survey had likely been based. Using these dates and the 1983 ONC Guidelines as the foundation, the First Nation's subsequent paylist analysis concluded that the DOFS population was 243 people, as follows:

Number Paid Annuities [in] 1876	160
Absentees who were paid arrears	55
New Adherants [sic] and Landless Transfers	26
Marriages to Non-Treaty Women	2
TOTAL	243

This analysis of individuals with treaty land entitlement in Kawakatoose's paylist used the categories outlined in the 1983 ONC Guidelines:

Persons included for entitlement purposes:

1) Those names on the paylist in the year of survey.

2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.

Sweetgrass, Thunderchild, Witchekan Lake, Canoe Lake, and English River Bands.

Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.

3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.

4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.

5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to treaty.[8]

Based on the Treaty 4 formula of 128 acres per person, Kawacatoose claimed that it was entitled to 31,104 acres but had received enough land for only 211 people – 27,040 acres – resulting in a DOFS shortfall of 4064 acres.

In response to the First Nation's request, DIAND's Specific Claims West Branch commissioned researcher Theresa Ferguson to prepare a report dealing with the

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[8] DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, pp. 215-16).

Kawacatoose DOFS population. This report, completed on July 31, 1992, arrived at a total population of 289 in the following categories:

Recommended Count [i.e., members present and paid at DOFS]	146
Questionable	13
Arrears/Absentees	56
Questionable	7
New Adherents	43
Landless Band Transfers	19
Eligible In-marrying Non-Treaty Women	5
TOTAL	289[9]

Following this report, further research was undertaken by Canada to clarify the status of the 13 "questionable" members of Kawacatoose at date of first survey. Eventually, Canada confirmed that it was appropriate to use the 1876 paylists for determining the DOFS population, but it concluded that the 13 questionable individuals – from two Assiniboine families named Man That Runs and Long Hair – had been members of the similarly named Assiniboine Poor Man (or Lean Man) Band and not of the Kawacatoose (Poor Man) Band. As a result, Canada advised counsel for Kawacatoose that the preliminary federal position was that there was no DOFS shortfall in the land surveyed for the First Nation.[10]

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[9] Theresa A. Ferguson, "Report on the Kawacatoose Band Date of First Survey Population," July 31, 1992 (ICC Documents, p. 251). The report is marked "Without Prejudice" and includes a disclaimer on its front cover that it "does not necessarily represent the views of the Government of Canada."

[10] Jane-Anne Manson, Assistant Negotiator, Specific Claims West, DIAND, to Stephen Pillipow, Pillipow & Company, Saskatoon, January 28, 1994 (ICC Documents, pp. 400-01).

Since the paylist analysis prepared for Kawacatoose had been based on the 1983 ONC Guidelines and had indicated a DOFS shortfall of land for some 32 people, the preliminary rejection of the claim on the basis of the exclusion of the 13 members of the Man That Runs and Long Hair families came as a surprise to the First Nation. Meetings were quickly convened between representatives of the First Nation and DIAND's Treaty Land Entitlement Branch on February 1, 1994, and between Chief Richard Poorman and the Minister of Indian Affairs and Northern Development, the Honourable Ron Irwin, on February 9, 1994.

In these meetings it was explained to the First Nation that the treaty land entitlement process involved two steps. The first step was the validation of a First Nation's claim based on the DOFS population, which included the base paylist figures together with absentees and arrears but excluded late adherents, landless transfers, and in-marrying women. Once the First Nation had satisfied DIAND that the DOFS population surpassed the threshold figure represented by the number of people for whom land had actually been surveyed – in this case, 212 – the second step was DIAND's acceptance of the claim for negotiation and settlement. In the settlement phase, DIAND was prepared to consider the three additional categories of people in order to arrive at a mutually agreeable compromise.[11] This position, together with undertakings to review certain matters, was conveyed in writing to Kawacatoose on February 15, 1994:

> Canada's position in regard to the Kawacatoose Treaty Land Entitlement is that the Date of First Survey population is confirmed as 202 and that

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[11] Ian D. Gray, Counsel, DIAND Legal Services, Specific Claims West, to Lorne Koback, Director, Treaty Land Entitlement, Saskatchewan Region, DIAND, February 11, 1994 (ICC Documents, pp. 403-04).

sufficient land was set apart as reserve for this population. It was agreed, however, at the Saskatoon meeting that Specific Claims West and Justice would review the evidence in the following areas:

(1) the paylists used in Cypress Hills in 1876;

(2) a further analysis of the two families who appear on paylists prior to 1876 with one family again appearing after 1876;

(3) confirmation as to whether or not the reserve that was set aside was actually 42.5 square miles; and

(4) a review of other files to determine whether any other bands were validated based on an Adjusted Date of First Survey population.

Once this evidence is reviewed and compiled, Jane Anne Manson of Specific Claims West and Ian Gray of Justice will meet with the Band to establish a final position.[12]

On March 28, 1994, counsel for Kawacatoose wrote to the Indian Claims Commission to request that the Commission review Canada's rejection of the First Nation's claim.[13] Counsel noted that, although Kawacatoose had not received a formal rejection of its claim, "the Band has been advised on a number of occasions that the federal preliminary position is that the Band's Claim to outstanding Treaty Land Entitlement will not be accepted for negotiation." Counsel's request was eventually

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[12] Jack Donegani, Associate Regional Director General, Saskatchewan Region, DIAND, to Chief Richard Poorman, February 15, 1994 (ICC Documents, pp. 405-06).

[13] Stephen Pillipow, Pillipow & Company, Saskatoon, to Indian Claims Commission, Ottawa, March 28, 1994 (ICC Exhibit 5, tab 11).

ratified and authorized by way of a Band Council Resolution which was subsequently provided to the Commission.[14]

Formal rejection of the Kawacatoose claim was ultimately delivered to Chief Poorman on May 18, 1994, in a letter from Al Gross, Director, Treaty Land Entitlement, DIAND:

> This letter is to formally advise you that the Kawacatoose Indian Band's TLE claim does not meet our acceptance criteria, and is, therefore, rejected.
>
> The federal government and the band agree on the Date of First Survey as 1876, and further research has confirmed that the band received 27,200 acres of reserve land, (sufficient land for 212 persons). It is the federal view that the preponderance of evidence indicates that the band received a TLE surplus rather than a shortfall and therefore does not have a TLE shortfall.[15]

The Commissioners reviewed the Kawacatoose claim on May 6 and 7, 1994, and agreed to conduct the inquiry requested by the First Nation. Formal notice of this decision was conveyed to the parties on May 17, 1994.[16]

The Commission is conducting this inquiry to inquire into and report on whether, on the basis of Canada's specific claims policy, the Kawacatoose First Nation has a valid claim for negotiation.

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14 Chief Richard Poorman to Indian Claims Commission, April 28, 1994 (ICC file 2107-15-1).

15 A.J. Gross, Director, Treaty Land Entitlement, to Chief Richard Poorman, Kawacatoose Band, May 18, 1994 (ICC Documents, pp. 407-08).

16 Dan Bellegarde and James Prentice, Co-chairs, Indian Claims Commission, Ottawa, to Chief and Council, Kawacatoose First Nation, Ron Irwin, Minister of Indian Affairs, and Allan Rock, Minister of Justice, May 17, 1994 (ICC Exhibit 5, tab 7).

THE SPECIFIC CLAIMS POLICY

Under the terms of the Commission's mandate issued September 1, 1992, this Commission is directed to report on the validity of rejected claims such as that submitted to it by the Kawacatoose First Nation "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by DIAND entitled *Outstanding Business: A Native Claims Policy – Specific Claims.*[17]

In this inquiry, much of the debate has focused on differences in the opinions held by Canada and the First Nation with respect to Canada's "lawful obligation" to provide land to the First Nation in fulfilment of its entitlement to land under the terms of Treaty 4. Although the term "lawful obligation" is used in *Outstanding Business,* it is not defined and remains undefined by Canada or the courts. However, it is worth quoting from the discussion of "lawful obligation" in *Outstanding Business* with a view to considering Kawacatoose's claim in its proper context:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.

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[17] DIAND, *Outstanding Business: A Native Claims Policy -- Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85.

iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

iv) An illegal disposition of Indian land.

. . .

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[18]

As we have noted previously, the list of examples enumerated in *Outstanding Business* is not intended, in our view, to be exhaustive.

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[18] DIAND, *Outstanding Business: A Native Claims Policy -- Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20.

PART II

ISSUES

Counsel for the parties to this inquiry are to be commended for their efforts prior to the inquiry to define clearly the scope of the issues to be considered by the Commission. The Commission is to identify whether Canada owes an outstanding lawful obligation to Kawacatoose, but this task has been focused by the following three questions placed before the Commission by agreement of the parties:

1. Are the two families who appear on the 1876 treaty paylist for Fort Walsh (Paahoska/Long Hair and Wui Chas te too tabe/Man That Runs) members of the Kawacatoose (Poor Man Band) First Nation or the Lean Man (Poor Man) First Nation?

2. Assuming, for the purposes of this inquiry, that the date-of-first-survey formula for determining outstanding treaty land entitlement is the appropriate formula to be applied and without prejudice to the position that other formulas are applicable under the terms of Treaty 4, does the First Nation have an outstanding treaty land entitlement on the basis that the additions (new adherents, landless transfers, and marriages to non-treaty women) to the First Nation after the First Nation's date of first survey:

   (a) are entitled to land under the terms of Treaty 4; and/or

   (b) are to be counted in establishing the First Nation's date-of-first-survey population to determine if the First Nation has an outstanding treaty land entitlement?

3. Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands which are party to the Framework Agreement?

During the course of these proceedings, counsel for Canada objected to having the third issue considered by the Commission on the basis that an allegation that Canada would ignore its obligations under the Framework Agreement so soon after that document was signed would prejudice Canada's ability to have a fair hearing before the Commission. Counsel also contended that the issue was clearly without foundation and so that it could be dealt with on a preliminary basis, thereby saving the time and expense of calling witnesses and documentary evidence to address it.[19]

It was our view, however, that counsel for the First Nation should be given full scope to develop this third issue, particularly in light of the interest expressed by other First Nations. It also appeared to us that evidence on the second and third issues might overlap to a significant degree. For these reasons we ruled that we would entertain evidence and argument relating to the third issue. This decision was communicated to the parties on March 8, 1995.[20]

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[19] Ian D. Gray, Counsel, DIAND Legal Services, to Indian Claims Commission, September 12, 1994; and, Gray to Indian Claims Commission, October 5, 1994 (ICC file 2107-15-1).

[20] Grant Christoff, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, Pillipow & Company, and Ian Gray, Department of Justice, Specific Claims West, March 8, 1995 (ICC file 2107-15-1).

PART III

THE INQUIRY

In this part of the report, we will review the relevant historical evidence. The Commission has reviewed a large volume of documentary evidence, as well as evidence from community members and experts. At the community session on the Kawacatoose Reserve in Raymore, Saskatchewan, on November 15, 1994, the Commission heard from Kawacatoose elders Elsie Machiskinic, Pat Machiskinic, Fred Poorman, John Kay, and Alec Kay, as well as a panel of experts from the Office of the Treaty Commissioner (OTC). The panel, Howard McMaster, Peggy Brizinski, Jayme Benson, and Marion Dinwoodie, presented the results of their research into the two families whose membership in the First Nation forms the substance of the first issue in this inquiry.

In a subsequent joint session with the Fort McKay First Nation held November 18, 1994, in Calgary, Alberta, the Commission heard evidence from Sean Kennedy, currently a private consultant to Indian organizations and bands and formerly a member of the Specific Claims Branch, DIAND. Mr. Kennedy was also one of the drafters of the 1983 ONC Guidelines.

The Commission held a second joint session with Fort McKay on December 16, 1994, in Ottawa, during which the evidence of Rem Westland, Director General, Specific Claims Branch, DIAND, was heard. Mr. Westland testified in relation to Specific Claims Policy and the criteria and process for accepting treaty land entitlement claims for negotiation.

Two additional joint sessions were conducted in Saskatoon, Saskatchewan, on May 24 and 25, 1995, with representatives from the Kahkewistahaw and Ocean Man First Nations in attendance. Testifying were Kenneth Tyler, at present counsel with the

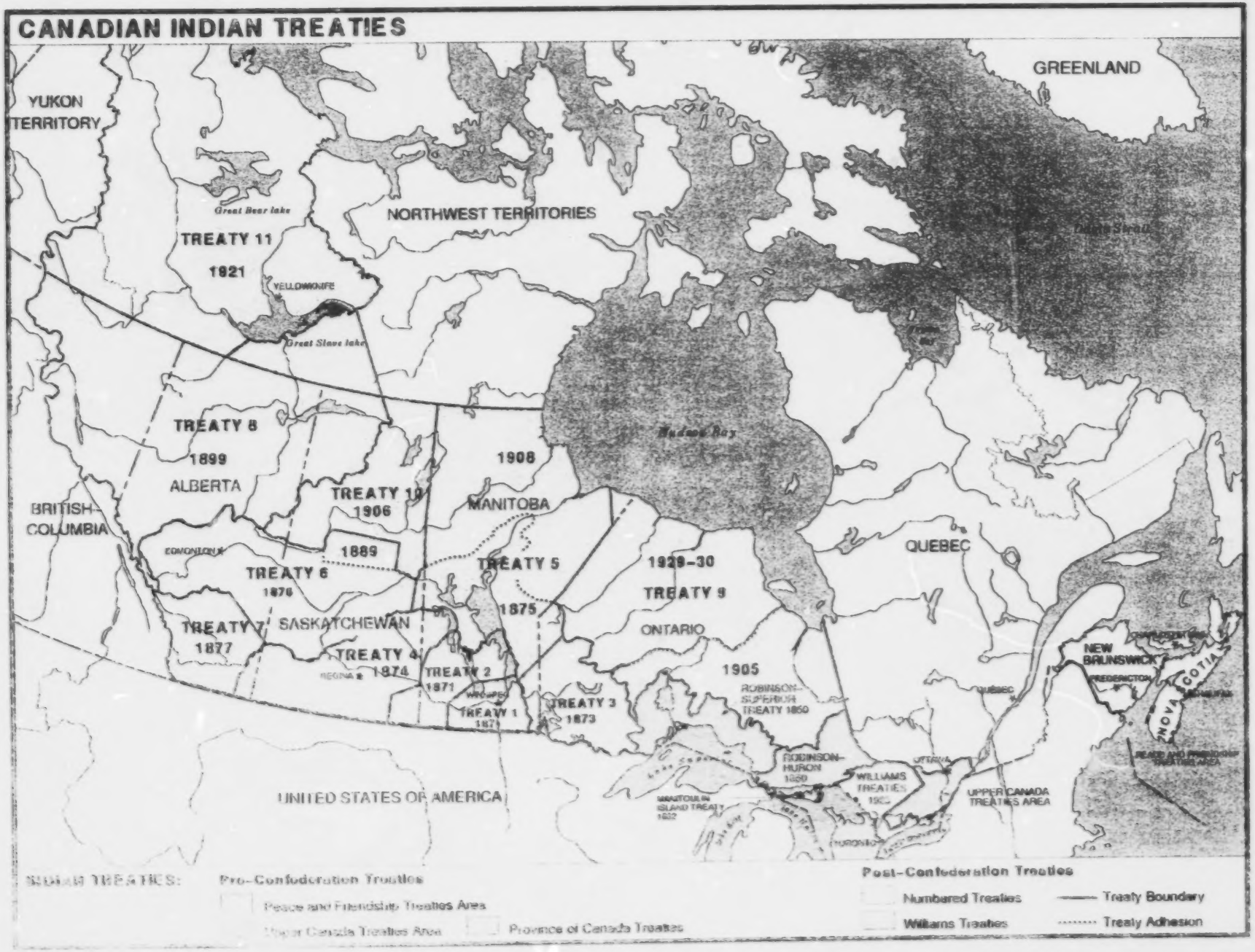
Constitutional Law Branch of Manitoba's Department of Justice and formerly in a similar position with the Government of Saskatchewan as well as a researcher and consultant on land claims issues; Dr. Lloyd Barber, the chief negotiator for the FSIN on the Saskatchewan Framework Agreement; David Knoll, counsel for the FSIN during the Framework Agreement negotiations; James Gallo, at present the Manager of Treaty Land Entitlement and Claims, Lands and Trusts Services, for DIAND, Manitoba Region, and formerly a researcher on treaty land entitlement for the Manitoba Indian Brotherhood who had assisted in the preparation of the Report of the Treaty Commissioner which was entered as Exhibit 4 in this inquiry; and James Kerby, counsel to Canada during the Saskatchewan Framework Agreement negotiations. The Commission also heard evidence from Peggy Brizinski and Jayme Benson of the OTC with respect to additional research on the two Fort Walsh families and general treaty land entitlement issues.

Counsel for Canada and Kawacatoose each submitted written arguments to the Commission in October 1995 prior to making oral submissions at the final session in Saskatoon on October 24, 1995. A list of the written submissions, together with all documentary evidence, transcripts of the foregoing sessions, the balance of the record of this inquiry, and details of the inquiry process, can be found in Appendix A of this report.

HISTORICAL BACKGROUND

Treaty 4

The early 1870s represent a period of great transition among the Indian nations that resided within the 75,000 square mile area of Treaty 4. The disappearance of the buffalo had been foreseen, white settlers were moving into the area, and some bands


CANADIAN INDIAN TREATIES
YUKON TERRITORY
GREENLAND
NORTHWEST TERRITORIES
Great Bear lake
TREATY 11
1921
YELLOWKNIFE
Great Slave lake
Hudson Bay
TREATY 8
1899
ALBERTA
1908
TREATY 10
1906
MANITOBA
BRITISH COLUMBIA
EDMONTON
1889
TREATY 6
1876
TREATY 5
1875
1929-30
TREATY 9
QUEBEC
SASKATCHEWAN
TREATY 7
1877
TREATY 4
1874
REGINA
TREATY 2
1871
TREATY 1
1871
TREATY 3
1873
ONTARIO
1905
ROBINSON-SUPERIOR TREATY 1850
NEW BRUNSWICK
FREDERICTON
NOVA SCOTIA
ROBINSON-HURON 1850
WILLIAMS TREATIES 1923
OTTAWA
UPPER CANADA TREATIES AREA
MANITOULIN ISLAND TREATY 1862
UNITED STATES OF AMERICA
INDIAN TREATIES:
Pre-Confederation Treaties
Peace and Friendship Treaties Area
Province of Canada Treaties
Post-Confederation Treaties
Numbered Treaties
Williams Treaties
Treaty Boundary
Treaty Adhesion

were taking steps to convert from the life of "plains buffalo hunters to reserve agriculturalists."[21] Other bands were becoming more nomadic, moving freely back and forth across the U.S. border in pursuit of buffalo – a staple of the aboriginal diet and way of life. However, the increasing scarcity of buffalo led to periods of hardship and starvation, as well as greater competition and, ultimately, intertribal warfare over the remaining animals. As noted in the report prepared for this inquiry by the OTC:

> Conflict between Assiniboine, Blackfoot, Gros Ventre, Crow and Sioux was common in the nineteenth century as well as conflict between Indians and non-Indians. The white settlers were not sympathetic to the plight of the Indians and often ignored their rights. The Indian practice of horse stealing, which was common between tribes, angered whites. The illicit whisky trade in which traders sold whisky to the Indians in exchange for buffalo robes or other commodities further exacerbated the violence. The Cypress Hills massacre was an example of the type of violence that occurred in this period. [22]

Moreover, the survey operations of the Boundary Commission and the steps associated with erecting a proposed telegraph line west of Fort Garry were starting to affect this territory, "all which proceedings are calculated to further unsettle and excite the Indian mind, already in a disturbed condition. . . ."[23]

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21 Steven Sliwa, "Kawacatoose Band #88 Date of First Survey" (Federation of Saskatchewan Indians, March 1992), p. 2 (ICC Documents, p. 233)

22 Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics" (November, 1994) (ICC Exhibit 2, vol. 1, tab A-4, p. 3).

23 Order in Council PC No. 944, July 23, 1874, in *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 3 (ICC Exhibit 28).

Alexander Morris was Lieutenant Governor of the area which then comprised Manitoba and the North-West Territories, including present-day Saskatchewan. Together with David Laird, the federal Minister of the Interior, and W.J. Christie, a retired factor with the Hudson's Bay Company, Morris was commissioned by the Government of Canada to make treaties with Indian nations in the southern "Fertile Belt."

At Lake Qu'Appelle in September 1874, the three Commissioners negotiated with the assembled Chiefs for six days to encourage the initially reluctant Indian leaders to accept the benefits of treaty in exchange for ceding Indian rights in the lands encompassed by Treaty 4. Morris reported the concerns expressed by the Chiefs at these meetings, particularly over what was perceived by the Indians to be the unfairly advantageous position of the Hudson's Bay Company at that time, but also over the rights of present and future generations of the aboriginal peoples. On September 11, 1874, the third day of the conference, Morris gave the Chiefs the following assurances:

> The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year. We promised them and we are ready to promise now to give five dollars to every man, woman and child, as long as the sun shines and water flows. We are ready to promise to give $1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five. . . .[24]

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[24] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 92-93 (ICC Documents, p. 12).

The next day Morris stated:

> The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the oceans. When you are ready to plant seed the Queen's men will lay off Reserves so as to give a square mile to every family of five persons. . . .[25]

On September 15, 1874 – the final day of the conferences – the Commissioners convinced the Indians to sign Treaty 4, with Morris reported to have said:

> I know you are not all here. We never could get you all together, but you know what is good for you and for your children. When I met the Saulteaux last year we had not 4,000 there, but there were men like you who knew what was good for themselves, for their wives, for their children, and those not born. I gave to those who were there, and they took my hand and took what was in it, and I sent to those who were away, and I did for them just as I did for those who were present. It is the same to-day. What we are ready to give you will be given to those who are not here.[26]

Thirteen Indian Chiefs, including Kawacatoose, signed Treaty 4 that day. The key provisions of the treaty to be considered by the Indian Claims Commission are as follows:

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[25] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 96 (ICC Documents, p. 14).

[26] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 117 (ICC Documents, p. 24).

> And whereas the Indians of the said tract, duly convened in Council as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective bands of such obligations as shall be assumed by them the said Indians, have thereupon named the following persons for that purpose, that is to say: . . . Ka-wa-ca-toose, "The Poor Man" (Touchwood Hills and Qu'Appelle Lakes). . . .
>
> And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded as follows, that is to say:–
>
> The Cree and Saulteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen, and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits. . . .
>
> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .
>
> As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman, not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.[27]

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[27] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 5-7 (ICC Exhibit 28).

The treaty also provided that members of signatory bands would be entitled to receive cash annuities, a yearly allotment of ammunition and twine, and material aid in the form of farm implements and livestock. The farm implements and livestock, together with a band's allocation of reserve land, were important to enable the band to develop a new economy based on agriculture,[28] but were not to be distributed without appropriate steps being taken towards actually implementing the new economy. As Indian Agent Angus McKay subsequently advised one band, which did not want its reserve surveyed in the absence of one of the band's headmen, "they would receive no cattle nor anything else except their rations, ammunition, twine and tobacco as the treaty provided that until they had their reserves marked out and had stables and hay for the cattle they were not to get any."[29]

Survey of Indian Reserve 88

Some bands were already incorporating agriculture into their economy and federal authorities took this into consideration. In July 1875 W.J. Christie was "appointed Indian Commissioner to pay Annuities & locate Reserves for Indians, according to the Terms and conditions of Treaty No. 4, made by Her Majesty's Commissioners with the Indians at Qu'Appelle Lakes in September last."[30] Kawacatoose was one of the Chiefs

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[28] Steven Sliwa, "Kawacatoose Band #88 Date of First Survey" (Federation of Saskatchewan Indians, March 1992), p. 5 (ICC Documents, p. 236)

[29] Angus McKay, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, October 14, 1876, National Archives of Canada [hereinafter NA] RG 10, vol. 3642, file 7581 (ICC Documents, p. 82).

[30] W.J. Christie, Indian Commissioner, to David Laird, Minister of Interior, July 16, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 30).

who indicated his readiness to settle down to farming. Early in July 1875 he sent a messenger to the Lieutenant Governor at Fort Garry:

> an Indian messenger had been sent down by the Chief "Poor Man" from the Touchwood Hills to Governor Morris, wanting cattle & agricultural implements, as they had (or wished) to commence to cultivate the soil, on their intended Reservation. . . . [H]e was told, that according to the Terms of the Treaty, cattle and agricultural implements were only to be given, when they were actually located on their Reserves.[31]

While making annuity payments in 1875, Commissioner Christie spoke with the various Chiefs about reserves. He reported:

> Many of the bands have no desire to settle and commence farming and will not turn their attention to agriculture until they are forced to do so on account of the failure of their present means of subsistence by the extermination of the Buffalo. Others have commenced to farm already, although to a very slight extent, and wish to have their Reserves set apart as soon as possible.
>
> Instructions have been given to Mr. Wagner D.L.S. to survey Reserves for the following bands . . .
>
> 2. Cawacatoose's, or the Poor Man's, (33 families) at the Big Touchwood Hills close to the Round plain north east of the Old Fort.[32]

Although Wagner began surveying in the Touchwood Hills area in 1875, he was interrupted by the onset of harsh winter weather on October 24, having made some

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[31] W.J. Christie, Indian Commissioner, to David Laird, Minister of Interior, July 16, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 32).

[32] M.G. Dickieson, Indian Commissioner, to Minister of Indian Affairs, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, p. 43).

progress on the survey of the reserve for Gordon's Band but none on the Kawacatoose reserve.[33]

Wagner and his party returned to the Touchwood Hills in 1876. On July 27, after completing his work on Gordon's reserve, Wagner intended to proceed immediately to survey Kawacatoose's reserve. The Chief, however, refused to accompany him.

> In this time I met Cawacatoose – the Lean or poor man – to whose Reserve I now intended to go, but notwithstanding all my exertions I could not move him – (he said his child was dying) –[34]

The treaty specifically stipulated that reserves were to be selected "after conference with each band of the Indians." The Chief's presence was important not only to identify the preferred location to the survey party, but also to ensure that the Band would know precisely the lines demarcating the reserve boundaries.

Wagner returned to Touchwood Hills at the end of August 1876 when the Commissioners arrived to pay annuities. The subject of the reserve was discussed at this time. According to Wagner, it was not the Chief who caused the delay:

> At Touchwood Hills I met the Commissioners and when paying was done, the head man of Cawacatoose (the real trouble) after an hour's speech was answered by Mr. Angus McKay so effectually that the Indian speaker appeared down-hearted and asked if I would go with him next day to see where they wished to have their reserve. Accordingly I went out with the Indian and before returning established the south East corner of the Reserve on the Bearing of the East boundary by an observation to Polaris.

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[33] William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 1876, NA, RG 88, vol. 300, file 0644.

[34] William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877 (ICC Documents, p. 107).

> This done I joined the Commissioners on their journey to Qu'Appelle. In the meantime my party coming up towards Big Touchwood Hills I gave my assistant the necessary orders how to proceed.[35]

This passage demonstrates that the annuity payments for 1876 were made to Kawacatoose and his people concurrently with the survey of their reserve. The Indian Agent, Angus McKay, confirmed Wagner's account, alluding to the difficulties being faced by the Indians at that time as they awaited the arrival of Commissioner Dickieson with their annuity payments:

> Mr. McBeath, the [Hudson's Bay Company] officer at Touchwood Hills deserves great credit for having supplied the Indians at that place with provisions so as to keep them from going away before Mr. Dickieson's arrival. In fact had it not been for him many of them would have been obliged to leave as they had no food.
>
> On the 28th [August] accompanied by Mr. Wagner, I met George Gordon and Ka-wah-ka-toos or "Lean Man" and decided upon the reserve for the latter and I supplied the former with some more farming implements and tools. I then sent Ka-wah-ka-toos with Mr. Wagner to mark out his reserve which is at the old H.B.C. fort on the South Side of the Big Touchwood Hills.[36]

McKay described the new reserve and the band's intentions for it in these terms:

> I will now proceed to deal with the subject of Bands & their Reserves. . . .

---

[35] William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877 (ICC Documents, pp. 108-09).

[36] Angus McKay, Indian Agent, to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, p. 90).

> 3rd. Chief Ka-wah-ka-toos or "Lean Man." This chief has a band of 39 families all of the Cree tribe who have always made their living by hunting and trapping. A reserve has been laid out and surveyed for them by Mr. Wagner on the south side of the Big Touchwood Hills at a place commonly called "The Old Fort." This is a very good farming country well supplied with smaller timber and numerous small lakes and grass meadows. The timber although small is fit for building purposes for the Indians and in the course of a few years it will improve greatly as it is of a rapid growth. There as in all the country lying N.N.W. & W. of this point is devoid of hard timber of any kind with the exception of Birch if that can be called hard wood. The country is of a rolling nature and good soil in parts rather light but very easily worked. None of the Band have as yet made any improvements on their reserve and have gone out on the prairie hunt. They have however expressed a desire to live on the reserve in the spring for the purpose of breaking land and building houses so as to be able to remain on their reserve next winter.[37]

Indian Reserve 88, surveyed by Wagner and his assistant in August-September, was shown on the survey plan dated September 1876 as containing 27,040 acres (42.25 square miles).[38] The boundaries were later altered by Dominion Land Surveyor John C. Nelson in 1889 upon confirmation of the survey by Order in Council, at which time the area of the reserve was stated to be 42.5 square miles (27,200 acres). The notes accompanying the Order in Council state that this step was effected "on account of a serious error in the original survey – the northern and southern boundaries were found

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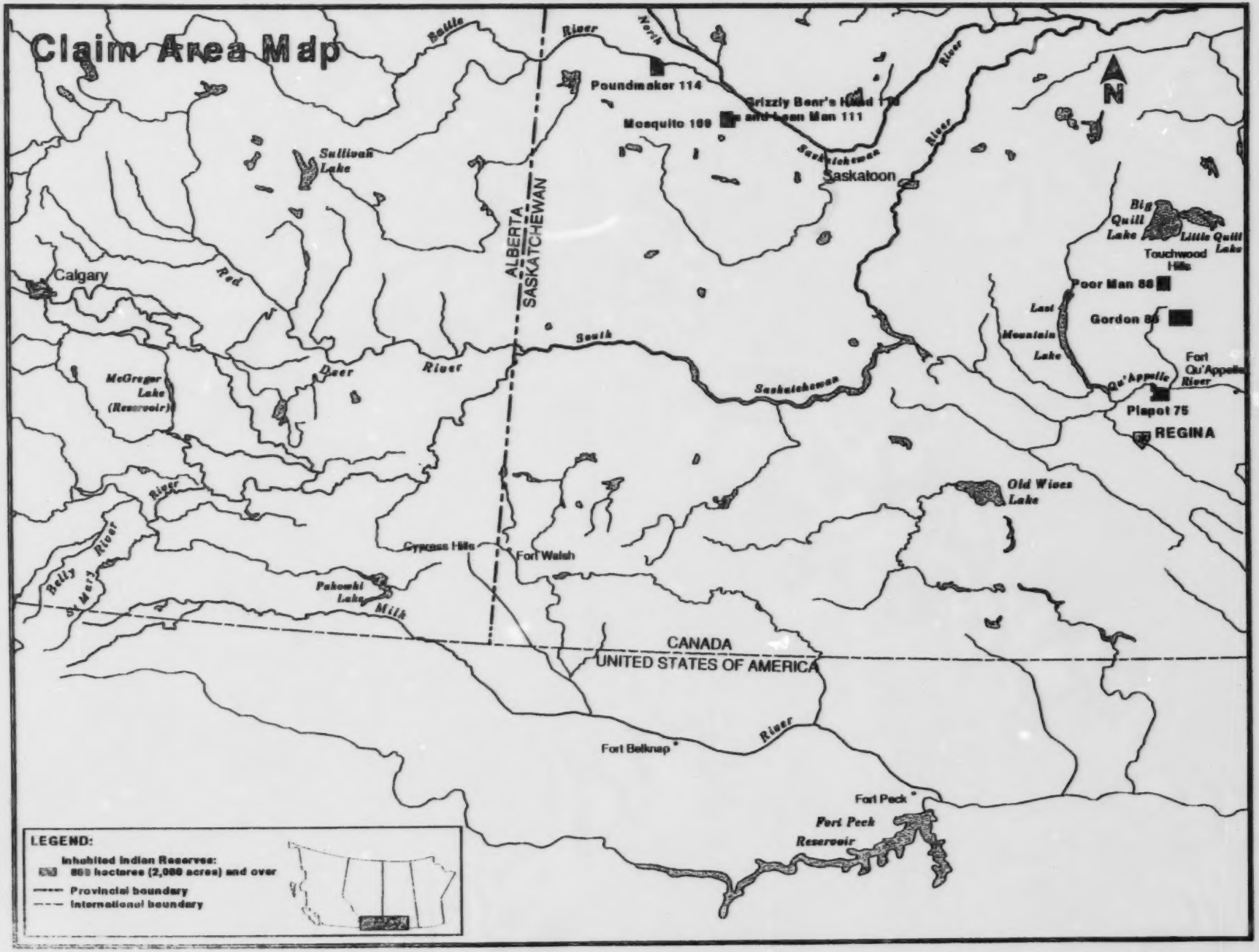
[37] Angus McKay, Indian Agent, to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, pp. 102-03).

[38] Survey Plan, "Indian Reserve Treaty No. 4, Kawahk-atoos, Lean Man's Band, Big Touchwood Hill, September 1876," DIAND, Land Registry, Microplan 847 (ICC Documents, p. 54). Wagner's field notes: "The Reserve contains 27040 Acres of which about 1/3 is wood. . . ." (ICC Documents, p. 53).


Claim Area Map
Battle River
North Saskatchewan River
Poundmaker 114
Grizzly Bear's Head 114
Mosquito 109
Saskatchewan River
Saskatoon
Sullivan Lake
ALBERTA
SASKATCHEWAN
Big Quill Lake
Little Quill Lake
Touchwood Hills
Calgary
Red Deer River
Poor Man 96
Last Mountain Lake
Gordon 86
South Saskatchewan River
Fort Qu'Appelle
Qu'Appelle River
Piapot 75
REGINA
McGregor Lake (Reservoir)
Old Wives Lake
Cypress Hills
Fort Walsh
Belly River
St Mary River
Pakowki Lake
Milk River
CANADA
UNITED STATES OF AMERICA
Fort Belknap
Fort Peck
Fort Peck Reservoir
N
LEGEND:
Inhabited Indian Reserves:
800 hectares (2,000 acres) and over
Provincial boundary
International boundary

to be nearly forty chains shorter than they are certified to be by the plan and field-notes."[39]

Based on the Treaty 4 allocation of one square mile per family of five (or 128 acres per person), the reserve laid out for Kawacatoose in 1876 was large enough to fulfil the treaty requirements for 212 people. We are satisfied that the foregoing evidence also establishes that 1876 represents the date of first survey, as well as the base paylist year for the First Nation.

We also note from the preceding references that during this period Kawacatoose was also referred to by Canada's representatives as the "Poor Man" and the "Lean Man."

Treaty Annuity Payments to Families at Fort Walsh, 1876

The accounts of William Wagner and Angus McKay from late August and early September 1876 show that Kawacatoose and his people were paid that year at or near the Touchwood Hills in central Saskatchewan.[40] However, the paylists from Fort Walsh showed two families (13 people in total) paid in 1876 under the heading "Poor Man": the first family (one man, one woman, and five children) had the name Paahoska or Long Hair, and the second (one man, two women, and three children) were named Wui chas te oo ta be or Man That Runs.[41]

Both families were paid arrears for 1874 and 1875 but were not paid for 1876 – it was government policy to make no more than two years' payments at any one time

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[39] Order in Council PC, May 17, 1889 (ICC Documents, pp. 157-61).

[40] See also ICC Transcript, November 15, 1994, p. 28 (Peggy Brizinski).

[41] Paylist, 1876 (ICC Documents, p. 364); ICC Transcript, November 15, 1994, p. 27 (Peggy Brizinski).

so as to reduce the potential for fraud. Neither family appears at any other time on the paylists for either Kawacatoose (Poor Man) or the Assiniboine Lean Man (Poor Man), although other members of Kawacatoose were paid at Fort Walsh in 1879.[42] The Assiniboine Poor Man Band adhered to Treaty 4 at Fort Walsh in 1877; at that time the Chief was elected and those of his people who were recognized as British Indians were paid for 1877 and given arrears for 1876.[43] Whether the Assiniboine Poor Man Band was in Fort Walsh in 1876 is unknown, but it was there from 1877 until 1882, when it migrated from the Cypress Hills to the Eagle Hills. It then was referred to more consistently as the Lean Man Band.[44]

The Kawacatoose Band was primarily Cree, but Kawacatoose himself was reportedly an Assiniboine, and the two names at Fort Walsh were listed in Assiniboine.[45] In fact, 11 of the 18 bands paid at Fort Walsh in 1876 were either Assiniboine or bands whose memberships, although mixed, were predominantly Assiniboine.[46] However, it was quite common for the Cree and Assiniboine to be allied and their populations intermingled:

> From a very early period the Assiniboine were allied with the Cree. . . . The alliance was military and commercial in nature. Both sides were able

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42 ICC Transcript, November 15, 1994, pp. 113-14 (Marion Dinwoodie and Jayme Benson).

43 ICC Transcript, November 15, 1994, p. 29 (Peggy Brizinski).

44 ICC Transcript, November 15, 1994, pp. 101-02 and 105 (Peggy Brizinski).

45 ICC Transcript, November 15, 1994, p. 94 (Peggy Brizinski).

46 Jodi R. Cassady, "Report No. 2 on the Assiniboine Families of Long Hair/Pa a Hoo Ka and Man That Runs/Wui chas te oo ta be of the Treaty 4 Area of Saskatchewan," September 30, 1993 (ICC Documents, p. 350).

> to take advantage of the alliance to battle traditional enemies such as the Blackfoot, Gros Ventre, Crow and Sioux. The relationship was also built on mutually beneficial trade. The Assiniboine obtained horses and firearms before the Cree, and the Cree then obtained these items from the Assiniboine. These two peoples hunted and trapped together.
>
> The close association of the two peoples meant that Crees and Assiniboines intermarried and mixed Assiniboine/Cree offspring were produced. Their offspring would often be identified as either Cree or Assiniboine or as a separate group. . . .
>
> Many Cree and Assiniboine also spoke both languages. . . .[47]

With the exception of the Little Mountain Band and possibly the Long Hair and Man That Runs families (depending on whether they were members of Kawacatoose or the Assiniboine Poor Man), all the bands paid at Fort Walsh in 1876 had adhered to Treaty 4 by that time.[48]

The first issue in this inquiry is to determine which of the two bands then referred to as the Poor Man can now properly claim these families as members. In the absence of definitive documentary evidence on the point, it is instructive to review the journal entries of Major Walsh, who was responsible for administering the payment of annuities at Fort Walsh in 1876 and 1877.

In relation to the 1876 payments, Walsh reported on a number of demands made by the various Indian bands:

> They further demanded that . . . the Assiniboines who had never attended a treaty should be taken in and be paid as they were and for the two

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[47] Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics," November, 1994 (ICC Exhibit 2, vol. 1, tab A-4, pp. 2-3).

[48] ICC Transcript, November 15, 1994, p. 91 (Peggy Brizinski).

> preceding years, using as a reason for this that they might possibly die between now and the time of next payment and [illegible] this year's payment. . . .
>
> In regard to the Assiniboines I told them that if there were any Indians present who had not heretofore been admitted to a treaty, and could prove to my satisfaction that they were British Indians, they would probably receive the first and second payment this year, and the 3rd and 4th payment next year, that the Government would not allow more than two years payment at one time. In conclusion I told them the payment would be made at the post and commence immediately on my arrival there, the bands would be paid separately. I gave the names of the bands I wanted first and the names of chiefs and bands designated would follow in rotation, the payment commenced on Friday, Sept. 1st and concluded on Monday. . . . I was informed at this juncture that forty (40) lodges more had arrived and that fifty (50) additional lodges were on the way. I immediately stopped payment and informed the Chief that as the number coming in was greatly in excess of what the Government supposed there were who had not heretofore attended any treaty and that I could not pay any more as it would require more money than I felt authorized to expend, and must defer further payment until I had communicated with the Hon. Supt. Genl. Ind. Affairs. The chiefs then informed me that these ninety (90) lodges were really British Indians from the Assiniboine and Belly rivers and had been obliged to cross the Missouri river as the Buffalo became scarce in their own country and had been living as much on this side of the line as the other, and were surely as much entitled to all the provisions of the treaty as the Indians who are living further north. . . . I then told them that argument was useless as I could not make further payment to non-treaty Indians. . . .
>
> I find that in admitting the Assiniboines we must be very careful in questioning the heads of families as to their families, some of them taken children of Sioux Indians to whom they are closely allied. . . .[49]

Walsh also reported on the practice of issuing metal checks to the Indians for identification purposes:

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[49] J.M. Walsh, Inspector, North-West Mounted Police, to Minister of the Interior, September 12, 1876 (ICC Documents, pp. 57, 60-63).

> I find that many of the Indians have pawned their checks to traders, and others, in case of the death of a head of a family have buried the check with him, and others have lost them. I told them it was [wrong] to pawn their checks and they must be careful and not loose [sic] them as they were given that they might be presented when payment was due and receive their money. I further found that many of the checks had been exchanged among themselves causing no little confusion and in making payment I was compelled in many cases to be guided entirely by the name in the book corresponding with the number of the check and by this means restore the check to its proper owner. To those whom it was proven had lost their checks I replaced by giving one of Zinc with a number corresponding to the one lost. As the checks to be issued to the Indians who were admitted into the treaty did not arrive, I issued checks made of Zinc marked W. V. X. in case of a chief bringing in Indians not before at a treaty I presented one of the W. V. X. checks, and added the additional letter V. W. or X. to the chief's band as the case might be. Several of the bands were divided part of whom had gone to Qu'appelle this was brought about by interested persons at Qu'appelle who had sent runners out on the prairie to tell the Indians, there was no payment to be made at Cypress Mountains and whoever told them as were trying to deceive them, the Indians were afraid they were not to receive any pay and part went to Qu'appelle and the rest came here. . . .[50]

On July 29, 1877, Walsh corresponded with E.A. Meredith, Deputy Minister of the Interior:

> There are between here [Fort Walsh] and Belly River about 90 Lodges of North Assiniboines who have never taken annuities from the Americans [and] crossed the line only when following the Buffalo. In fact all North Assiniboines are British Indians and will be present for payment this summer. . . .

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[50] J.M. Walsh, Inspector, North-West Mounted Police, to Minister of the Interior, September 12, 1876 (ICC Documents, pp. 63-5).

> In the mean time I will proceed to Fort Peck and procure a copy of Books and have census completed before payment. These Books no doubt will contain the names of many Indians who do not belong to the Americans but who were entered to the Agency by the Agent so that they might appear on his Books and draw Annuities for them. . . .
>
> No doubt you will think it strange that an Indian Agent will coax Indians to their Agency. I don't mean to say they are anxious to issue Annuities to them, but to register as many Indians as possible on their Books whereby the appropriation for each Agency is regulated.[51]

Walsh wrote to Meredith again on October 28, 1877:

> In my letter to you of the 27th Sept. I had the honor to report that the Indians had assembled here for payment on or about the 19th Sept.; on the 22nd Sept. I requested Mr. Allen to take the census of the different camps assembled, which duty he performed and completed same on the 23rd Sept. There were forty-seven (47) lodges of Crees, sixty (60) lodges of Saulteaux and forty-four (44) lodges of Assiniboines who had been paid last year, and about one hundred and forty-five (145) lodges of Assiniboines who had never given adhesion to any previous treaty nor received payment. There is no doubt as to the legitimacy of the Assiniboines (admitted to treaty) being British Indians and entitled to receive annuities. . . .
>
> Two years ago when "Long Lodge," "Little Mountain," and the "Poor Man" refused to go to the Agency to receive annuities, both "Little Chief" and "Shell" went. "Little Chief," "Shell" and King number from eighty (80) to ninety (90) Lodges all originally British Indians. I carried out your instructions to procure a copy of Belknap Agency Books and sent Mr. Allen to Wolf Point for that purpose on the 2nd August, when he obtained said copy from the Assiniboine Agent of all Indians who were claimed by the American Government, less "Little Chief's" band whom the Agent stated he had sent for, but had refused to go in. I kept this book

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[51] J.M. Walsh, Inspector, North-West Mounted Police, to E.A. Meredith, Deputy Minister of the Interior, July 29, 1877, NA, RG 10, vol. 3649, file 8280 (ICC Documents, pp. 115-17).

before me as a guide when an Indian presented himself for payment whom I had not seen before I would refer to said book by which precaution I am positive there are no Indians other than ones taken in Treaty. There are two or three names of North Assiniboines whose names are the same as some who appear on the U.S. Books, they are certainly not the same individuals, for instance two persons of the same name are often found in the same band as you will see in enclosed U.S. Agency books. After Mr. Allen had completed taking the census I found that non treaty Indians were divided into three Bands, sixty-nine (69) lodges under the "Man who took the Coat," forty-two (42) lodges under "Long Lodge," and thirty-four (34) lodges under the "Poor Man" . . .

The "Poor Man" much the same as "Long Lodge's" camp, is very much reduced owing to the objection that many of his followers were American Indians; he has at present thirty-four (34) lodges; he is a good man and very friendly to the Whites; his people said they would not join any other Chief, and if I could not admit him as such, to pay them by themselves. As the Act states that every Band composed of thirty (30) Indians was entitled to a Chief, I allowed them to elect him as such. . . .

I only took the English names of the Indians this year, as I have found the Indian names to be very often mispelled [sic] and mispronounced, no two persons giving it the same sound. Indians will very often have two names as they frequently change them, and when asked what his name is will invariably give the last one. When the name is taken in English and an Indian asked if he had another name (at the same time mentioning it) it is almost sure to be found out. . . .

I would recommend that a place for the payment of each band or tribe be settled on; that said bands be notified as to their place of payment the coming spring, so that they can offer no excuse for being absent; that no Indian be paid other than at the place for his Band. You must see that when Bands divide, one half going to one place and the balance to another place, it must end with a loss to either the Government or Indian.

By having an established place for the payment of each Band a much better account and roll can be kept from year to year of the different Bands or tribes. If an Indian be absent from payment one year it would be readily seen upon payment the following year, and payment could be made to him without any danger of loss to the public. To guard against loss under the present system, a copy of the books of payment made at

> this post would have to be sent to each and every place where payment is made, and the same sent from other places to this post. The time occupied in looking over the several books when persons present themselves for arrears would consume a great deal of time and delay payment which, as you are aware, is a serious matter when there is a large camp to feed. . . .[52]

From these passages it can be seen that Walsh was careful to ensure that payments were made only to British Indians, and that he was prepared to pay Indians who had not yet adhered to treaty. He was also aware that some bands were divided, with some members receiving payment at one location and other members at another. This was confirmed by Peggy Brizinski, who noted that several bands had been paid in part at Qu'Appelle and in part at Fort Walsh. According to the research panel from the OTC, Walsh would have had to accept on faith that certain factions belonged to particular bands, since the remainder of those bands were often paid at about the same time in a different location and Walsh would have been unable to confirm membership in a given band prior to making payment.[53]

Walsh elaborated on his allocation of zinc checks bearing the letters "W," "V," and "X" to new adherents to treaty or transfers from other bands, and it can be seen on the 1876 paylists that the two "Poor Man" families paid at Fort Walsh in 1876 were designated with the letter "V."[54] The OTC Research Report notes that check letters

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52 J.M. Walsh, Inspector, North-West Mounted Police, to E.A. Meredith, Deputy Minister of the Interior, October 28, 1877, NA, RG 10, vol. 3649, file 8280 (ICC Documents, pp. 119, 121-25, 128-29, 136).

53 Peggy Brizinski, Special Advisor, OTC, to Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, Specific Claims West, DIAND, November 1, 1993 (ICC Documents, pp. 393-94).

54 Paylist, 1876 (ICC Documents, p. 364).

were assigned to bands on the paylists, with "B" recorded as the letter assigned to Kawacatoose in 1874, 1875, 1876, and 1878.[55] On this point, Peggy Brizinski observed:

> The letter V beside the two names is interesting. It does not seem to correspond with any band designation for 1875 or 1876, but I have noted that some people paid at Fort Walsh with other bands have this same designation, and that some of them appear to be Assiniboine. Perhaps this was a special designation used by the agent which does not necessarily refer to any particular band.[56]

In the course of its research, the OTC investigated the Montana State Historical Society Archives, the Glenbow Institute in Calgary, the Hudson's Bay Company Archives in Winnipeg, the Saskatchewan Archives in Regina, Parliament's Sessional Papers, DIAND records from 1870 to 1920, records of the North-West Mounted Police and Royal Canadian Mounted Police, and archives of the Church Missionary Society. The OTC's researchers found a number of references to people named Long Hair and Man That Runs or variations on those names, with both being "fairly common" to both Cree and Assiniboine bands, but no conclusive evidence was unearthed either to link those names to Kawacatoose or the Assiniboine Poor Man Band or to contradict the evidence of the elders at the community session.[57] Similarly, although the names Long

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[55] Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics," November, 1994 (ICC Exhibit 2, vol. 1, tab A-3, p. 2).

[56] Peggy Brizinski, Special Advisor, OTC, to Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, Specific Claims West, DIAND, April 29, 1993 (ICC Documents, pp. 296-97).

[57] ICC Transcript, November 15, 1994, pp. 37, 40, 50, 110-11 (Jayme Benson, Marion Dinwoodie, and Peggy Brizinski); ICC Transcript, May 25, 1995 pp. 278-79 (Jayme

Hair and Man That Runs were located in the Fort Peck and Fort Belknap records now situated in Seattle, Washington, no definitive connection could be established with the two Fort Walsh families or either Poor Man band.[58]

Evidence of Elders

Elders of the Kawacatoose First Nation spoke before the Commission during the community session on November 15, 1994, with regard to the heritage of the two families paid at Fort Walsh in 1876. Elder Elsie Machiskinic stated:

> I used to hear my late husband, who died in the spring of '94, and he had a statutory declaration on file with his evidence. And then I heard him tell the stories about the Man That Runs, he ran so fast that he was an honoured person in the community, so that's plain to see he belongs here. Also Long Hair that was relative to him.[59]

Elder Pat Machiskinic, through interpreter Beatrice Assoon, stated:

Benson). A similar conclusion was reached by Jodi Cassady in her investigations into the two families: "The Annuity Paylist review was successful in that a 'Long Hair' was found after 1876 listed successively in the Bands of Father of All Children, Lucky Man, Piapot, and Bear's Head between 1878 and 1883. The name 'Man That Runs,' and a few of its variations, were found not only in 1876 but after that year as well listed in the Bands of Poor Man (Assiniboine), Piapot, Red Eagle, Lucky Man, Little Pine, and Man Who Took The Coat between 1876 and 1882. I did not find either one of these names, or their variations, in the Cawacatoose/Poor Man Treaty Annuity Paylists for 1874 to 1884, inclusive" (Jodi R. Cassady, "Report No. 2 on the Assiniboine Families of Long Hair/Pa a Hoo Ka and Man That Runs/Wui chas te oo ta be of the Treaty 4 Area of Saskatchewan," September 30, 1993, ICC Documents, p. 349).

[58] Terry Ann Young, "Report on the Research Undertaken at the National Archives and Records Administration, Seattle, Washington related to the Presence of the Families 'Long Hair' and 'Man That Runs' at Fort Peck and Fort Belknap, Montana, U.S.A.," September 1994 (ICC Documents, pp. 489-721).

[59] ICC Transcript, November 15, 1994, p. 116 (Elsie Machiskinic).

> The Man With Long Hair, the Long Hair and the Man Who Runs were brothers, they belonged here. They ran all over together. Their families belonged here. That's what he said, they came from here.[60]

On questioning by counsel for the Commission, Pat Machiskinic continued:

> MR. CHRISTOFF: Okay. Now were the Man That Runs and Long Hair, were they Cree or Assiniboine?
>
> PAT MACHISKINIC: They were Cree. That's a Cree name. His Cree name was Wui chas te too, Fast Runner, and the one that had long hair, they ran together, but one was faster.
>
> MR. CHRISTOFF: You mention that they ran together, does this mean that they travelled together?
>
> PAT MACHISKINIC: They travelled all over, they go any place. Overnight they could get to Piapot from here. They ran, they went all over, but they belonged to here.
>
> MR. CHRISTOFF: Following up on that question, do you know why the Man That Runs or Long Hair would have been in the Fort Walsh area around the time of the treaty, which is 1876?
>
> PAT MACHISKINIC: That's what I just finished telling you. They went all over together. They were brothers, you couldn't part one and another. It was nothing for them to go any place they wanted to go overnight, running.[61]

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60 ICC Transcript, November 15, 1994, p. 117 (Pat Machiskinic).

61 ICC Transcript, November 15, 1994, p. 122 (Pat Machiskinic).

Mr. Machiskinic also testified that Man That Runs was the grandfather of Paul Acoose, who formerly lived on the reserve but had subsequently married a woman from the Sakimay Reserve and moved there.[62]

In Statutory Declarations dated August 13, 1993, and September 10, 1993, elders Alec Poorman and Pat Machiskinic also declared that previous elders of the First Nation had informed them that Kawacatoose was an Assiniboine who became a member of the band when he married the former Chief's daughter and became Chief himself. Alec Poorman continued that his father and other elders told him of Man That Runs who hunted with the band and could outrun a horse.[63]

Elder Fred Poorman confirmed that Man That Runs and Long Hair were brothers and that they belonged to Kawacatoose.[64] In addition to singing a song he knew about the two men, elder John Kay gave a similar account through the interpreter:

> He elaborates on the Man With Long Hair, he was a very good runner, a very good hunter and when he would run his hair would flare at the back of him, he ran so fast. He done all his hunting by running. And the Man Who Runs Fast was also a good runner, they were related. . . .
>
> Mr. Kay, he knows where the burial of these two men are, it's in the northern – north in his fields, it's all bush now, but that's where these two are buried on top of a hill. He still calls it the graveyard.[65]

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62 ICC Transcript, November 15, 1994, pp. 122-23 (Pat Machiskinic).

63 Alec Poorman, Kawacatoose Band, Statutory Declaration, August 13, 1993 and Pat Machiskinic, Kawacatoose Band, Statutory Declaration, September 10, 1993 (ICC Documents, pp. 298-99).

64 ICC Transcript, November 15, 1994, pp. 118 and 121 (Fred Poorman).

65 ICC Transcript, November 15, 1994, pp. 119, 123-24 (John Kay).

Elder Alec Kay agreed that the two men belonged to Kawacatoose and that they have relatives in the band.[66]

The OTC researchers also provided an appendix to their main report detailing interviews with elders of the Mosquito/Grizzly Bear's Head/Lean Man Band to determine whether those elders could recall if the families of Long Hair and Man That Runs had connections with that Band. Because the elders from that Band felt more comfortable meeting with people who could speak Assiniboine, the interviews were conducted at the reserve on February 8, 1995, by Clifford Spyglass and his father, William Starchief, both members of the Mosquito/Grizzly Bear's Head/Lean Man Band, who asked questions previously formulated by the OTC. The OTC researchers did not attend these interviews and their report merely discusses the contents of Mr. Spyglass's letter on the subject.[67] With respect to Long Hair, Mr. Spyglass reported:

> All of the Elders we have spoken to or visited cannot recall ever hearing about this person, so we do not have any information regarding Long Hair. Although we tried to say his name in assiniboine, and also in cree, no real information was gathered and we are sure that they never heard about him.[68]

The elders did, however, recall Man That Runs:

> The information that we have gathered, some Elders say that they recall hearing about this individual way back in the 40's. . . . Although they never did actually see or meet the person, I have the impression that this

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[66] ICC Transcript, November 15, 1994, p. 120 (Alec Kay).

[67] ICC Transcript, May 25, 1995, pp. 280-81 (Jayme Benson).

[68] Clifford Spyglass, Land Manager, Mosquito Band to Howard McMaster, Executive Director, Office of the Treaty Commissioner for Saskatchewan, May 1, 1995 (ICC Exhibit 24).

person was a popular person, because of the extensive travelling he did as well as the talent he had, as a very good runner.

The Elders believe that this person is from a different band, because he was not on the Mosquito treaty paylists and there are no direct descendants from this person living on the Mosquito Reserve presently. And there is no knowledge from anyone to confirm that he resided or settled down around here.

Irene Spyglass is an 80 year old woman from Mosquito Reserve and she says that her Grandfather from her mothers [sic] side was one of the two brothers Man that Runs had, and he was called by the assiniboine name, Be-yah-gahn. She gave a clear indication that this individual, Man That Runs was never a Mosquito Band member and she does not recall ever hearing of this individual as a Mosquito Band member.

Of all the visits we conducted, the Elders were quite sure that this man was never a Mosquito resident which would conclude that this individual was from elsewhere, but Mosquito. When I mention Mosquito, I am including Mosquito, Grizzly Bears Head and the Lean Man reserves as one.[69]

TREATY LAND ENTITLEMENT PROCESS IN SASKATCHEWAN

The second issue in this inquiry deals generally with the question of which Indians are entitled to be "counted" for treaty land entitlement purposes. In simple terms, Canada's position is that its lawful obligation is to count only those Indians who were members of the band at the date of first survey, using the best evidence available to establish those numbers, including consideration of absentees and arrears but excluding additions to the population after date of first survey, such as late adherents to treaty and landless transfers. The Kawacatoose position is that, subject to the exclusion of those individuals whose ancestors have already been counted, each treaty Indian is entitled to be counted for treaty land entitlement, meaning that late adherents and landless

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[69] Clifford Spyglass, Land Manager, Mosquito Band to Howard McMaster, Executive Director, Office of the Treaty Commissioner for Saskatchewan, May 1, 1995 (ICC Exhibit 24).

transfers should be part of the count. The First Nation views the 1983 ONC Guidelines as the written expression of its position and as evidence of Canada's earlier recognition of those guidelines as its lawful obligation.

These positions will be given fuller expression later in this report. The present section of the report deals with the development of the treaty land entitlement process in Saskatchewan.

Historical Developments

Perhaps the earliest expression of Canada's view of treaty land entitlement – and the closest to being contemporary with the signing of Treaty 4 and the survey of IR 88 – was set forth in a letter dated November 27, 1882, from Commissioner Edgar Dewdney of the Department of Indian Affairs to Chief Poundmaker of the Poundmaker Band:

> Now about your Reserve. The land you now hold was the quantity you were entitled to under the Treaty at the time it was surveyed.
>
> If your numbers have increased and should do so next spring, I will authorize your Reserve to be increased in size and if no white people settle opposite you on the Battle River I will ask the Government to extend it in that direction, but you must understand *I can only do this if your number of Indians increase otherwise than by births.*[70]

Dewdney's comments found practical expression in a number of instances detailed in a report prepared by the Department's Heather Flynn in October 1974.[71]

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[70] Commissioner Edgar Dewdney, Department of Indian Affairs, Regina to Chief Poundmaker, November 27, 1882, Archives of Manitoba, MG-1, A3, No. 577 (ICC Documents, p. 149). Emphasis added.

[71] Heather Flynn, Indian Lands Division, "Residual Land Entitlement Under Treaty," October 1974, attached to a memorandum from G.A. Poupore, Manager, Indian Lands Division, to W. Fox, Operations Branch, February 6, 1975 (ICC Exhibit 27).

Manitoba's Lake St. Martin, Little Saskatchewan, and Chemahawin Bands, as well as Alberta's Stony, Beaver, Little Red River, Sucker Creek, and Bigstone (Wabasca) Bands, all received additional treaty lands notwithstanding having received sufficient land at date of first survey to satisfy treaty requirements. In each case, the calculation of the acreage of these additional lands was predicated on the band's current population figures rather than the DOFS population. Further justifications of providing these additional lands included:

- social and economic reasons;
- inadequate treaty formulas for the provision of land (32 acres per person under the terms of Treaties 2 and 5 as opposed to 128 acres per person under Treaty 4); and
- in the cases of the Stony and Bigstone (Wabasca) Bands, late adherence by "roving Indians" or "non-treaty Indians."

These reserve additions or creations took place over a period spanning from 1911 to 1965.

The OTC research panel added that Saskatchewan's Cowessess Band also received additional land in 1883 or 1884 to account for additions to the Band's population after DOFS. Similarly, the Thunderchild Band had land added to its reserve to accommodate the affiliation of Young Chipewyan and Napahase Band members after the original survey of the Thunderchild reserve in 1881.[72] In the words of Kenneth Tyler:

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[72] ICC Transcript, May 25, 1995, pp. 298-300 (Peggy Brizinski).

> Well in my view the historical record indicated that starting as early as 1883 with Cowessess, right up into the 1950s, the Department of Indian Affairs had accepted the idea that land entitlement should be calculated on the basis of current populations at the time of particular surveys and that if entitlement wasn't fulfilled at the date of the first survey, then a new calculation based on current population was done at the date of subsequent surveys and the historical record, in my view, was replete with many examples where this was actually done, or it was acknowledged in the correspondence that this was what should be done.
>
> The historical record is not entirely unambiguous, there are a few examples which you could cite that cite other factors in addition to that, but certainly the overwhelming evidence, in my view, was that the current population was used. . . .[73]

Sean Kennedy explained Canada's historical practices in these terms:

> Prior to 1974 though, and this is what I was referring to, the government did use multiple surveys to go and fulfill. If they knew or were aware that there was a shortfall for a band – like I was saying in Bigstone, they acknowledged in 1915 that they were going to have to survey more land for this band at some point in the future as more Indians joined treaty. . . .
>
> But it was the government's historical practice that if a band was short land and needed more, they would give it to them. Because land was quite available. Certainly before 1930 when the Natural Resources Transfer Agreements came into practise and even up to 1960, you still had quite a bit of land available to do this. So people thought nothing of it. Then as it became scarce then you get the restrictions.[74]

In response to a question of whether the historical record supports Canada's assertion that its lawful obligation is limited to providing land for a band's population

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[73] ICC Transcript, May 24, 1995, pp. 48-49 (Kenneth Tyler).

[74] ICC Transcript, November 8, 1994, pp. 37-38 (Sean Kennedy).

at date of first survey as indicated in the annuity paylists, Peggy Brizinski of the OTC testified:

> Actually, I don't believe in the early years that that was contemplated. This is a very retroactive opinion, but there was a lot of concern at that time about the accuracy of the numbers, there was some correspondence about the difficulty of dealing with the issue of payment, for example, people were going back and forth between posts. They certainly were aware that there were problems in using that type of accounting as a way of getting at the issue of band membership. . . . So I don't believe at that point, when the first surveys were happening that there was an attempt to limit it. I think they were actually fairly reasonable in trying to accommodate the population as best they could at that time. I think it was really somewhat later that we began to see discussion about whether or not it should be fixed. But in the early days they were being as flexible as they could be in response to band fluctuations. And this has been stated many times, there was a fairly fluctuating band membership.[75]

The same question was put to James Gallo, who responded:

> The historical records wouldn't speak to Canada's view of its legal obligation as of 1995. If the question is, was entitlement considered to be, in the past, based solely on date of first survey shortfall, then the answer is – what period of time are we looking at? . . .
>
> Other cases, like in the 1920s and 1930s in Northern Alberta they're looking at, okay, how many people have come into treaty since the reserve was surveyed, maybe we should be surveying additional land on that basis. In other instances, when you get into the later 1950s, early 1960s, you get situations like the Lac La Ronge Formula being applied. So the answer to your question is, depending on what period of time you're talking, because you're going to get different answers.[76]

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75 ICC Transcript, May 25, 1995, pp. 295-96 (Peggy Brizinski).

76 ICC Transcript, May 24, 1995, pp. 206-08 (James Gallo).

On questioning regarding multiple surveys, Mr. Gallo continued:

> Q. So then are there instances where a surveyor was sent out to add land to a reserve as a result of additions to a band after the date of first survey?
>
> A. Oh yeah, in Treaty 8, in particular. If you take a look at the files relative to Northern Alberta from about 1908 on through to about 1939, 1940, you will find a number of instances where that occurred. White Fish Lake, Little Red River, and there's one or two other bands around that period in the Treaty 8 area where there were a number of people that are taking treaty and joining one of those bands and the government is aware that the population is going up and ultimately additional land is surveyed on account of those numbers.[77]

The gist of all the foregoing evidence is that, historically, as a basic premise, Canada used a band's population at date of first survey as the foundation for establishing treaty land entitlement. Howerver, Canada was also prepared to reconsider a band's treaty land entitlement in the light of factors such as late adherents and landless transfers.

A report entitled "Treaty Land Entitlement – Development of Policy: 1886 to 1975" dated November 15, 1994, by Elaine M. Davies, a research consultant for DIAND, was entered in this inquiry as Exhibit 31. It references a number of documents on which the author bases the conclusion that "the idea of counting a band's membership once, and from that number determining the amount of reserve lands owed to it under treaty, was the policy of the Department of Indian Affairs at least from 1886

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[77] ICC Transcript, May 25, 1995, pp. 246-47 (James Gallo).

onwards."[78] One such document is a letter dated March 8, 1887, from L. Vankoughnet, the Deputy Superintendent of Indian Affairs, to the Superintendent of Indian Affairs addressing the idea of removing land from the St. Peter's Band reserve to account for half-breeds defecting from the band to accept scrip:

> [T]he undersigned begs very respectfully to state that the reserve in question was allotted to the St. Peter's Band of Indians, in so far as the area thereof is concerned, proportionately to the number of souls in the Band at the time that the Treaty was negotiated with those Indians, and that it there and then became the property in common of the Band, and that without reference to future increases or decreases of number, and that the mere fact of certain Half-breed members of the Band having in the exercise of their rights accorded them by law, withdrawn from the Treaty and accepted Half-breed scrip, would not in the opinion of the undersigned justify the Government in curtailing to any extent the Reserve of the Band aforesaid. The land is held as common property by the Band, and it might be asked if, instead of members withdrawing from the Treaty an equal number were to be added to it, would the Government be prepared to augment the area of the Reserve beyond the extent of the Territory granted the Indians as a Reserve when the Treaty was made with them, and it is a poor rule that will not work both ways. Moreover, the Indians regard this Reserve as the property of the Band without reference to the numbers in the Band, and were any attempt made to curtail the same by making free grants, as proposed, to parties who profess to have obtained possession of the lands after the date of the Treaty, it would lead to very serious consequences. . . .[79]

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[78] Elaine M. Davies, Research Consultant, Litigation Support, "Treaty Land Entitlement -- Development of Policy: 1886 to 1975," November 15, 1994, p. 7 (ICC Exhibit 31).

[79] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa, to Superintendent General of Indian Affairs, March 8, 1887, NA, RG 15, vol. 497, file 139441-1 (ICC Exhibit 31, tab 2, p. 4).

Nine years later, dealing with the same issue, Hayter Reed, the Deputy Superintendent General of Indian Affairs, advised A.M. Burgess, the Deputy Minister of the Interior:

> This Department, however, has always held that the Reserve was allotted to the Band of an area proportionate to the number of souls therein at the time when the Treaty was negotiated, and there and then became the property of the Band in common, without reference to future augmentation or decrease of number, and such view was so generally understood by officials in the west to be the correct one that the Indians were always given to believe that they would be compensated for any lands of which they might be deprived.[80]

Reed also quoted from an opinion of the Department of Justice that the size of a reserve could not be reduced to reflect a shrinking population without the approval of the remaining members of the band in question.

In the same time frame, in response to a query from surveyor A.W. Ponton regarding the band population to be used in surveying reserves, R. Sinclair on behalf of the Deputy Superintendent General of Indian Affairs wrote to E. McColl, the Inspector of Indian Agencies:

> a Band of Indians is in every case entitled to an amount of land corresponding to the census taken immediately subsequent to the treaty, notwithstanding any subsequent defection or increase in the number of members in the Bands.[81]

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[80] Hayter Reed, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Minister of the Interior, May 11, 1896 (ICC Exhibit 31, tab 5, pp. 1-2).

[81] R. Sinclair, for the Deputy Superintendent General of Indian Affairs, to E. McColl, Inspector of Indian Agencies, Winnipeg, October 11, 1890, NA, RG 10, vol. 1918, file 2790 (ICC Exhibit 31, tab 4, p. 1).

Later, in the negotiations leading to the transfer of responsibility for natural resources to the Prairie Provinces in 1930, Canada was asked by Manitoba to limit the areas of land to be selected to fulfil treaty obligations with the Indians. Duncan Campbell Scott, the Deputy Superintendent General for Indian Affairs, responded to the Deputy Minister of Justice:

> The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to insert any limitation of acres in the Agreement.[82]

While these letters in the Davies report address the date on which the population of a band should be determined to establish treaty land entitlement – and may even suggest that the acreage of a band's reserve be based on a one-time count of the band's population – none deal with the specific issue of whether Canada has historically provided bands with additional land to account for new adherents to treaty or transfers from landless bands. Even if it was Canada's intention that treaty land entitlement in all cases was to be based on the number of people present at the time of treaty or a census immediately following treaty, with no consideration given to subsequent

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[82] Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, to Deputy Minister of Justice, September 4, 1929 (ICC Exhibit 31, tab 6, p. 2).

increases or decreases, it is evident that nobody followed that instruction, with surveyor Ponton himself surveying land that took into account a shortfall "plus a bit extra."[83]

Later letters in the Davies report demonstrate a government grappling with the problem of how to deal with additions to band populations after date of first survey. In 1939, Surveyor General F.H. Peters advised D.J. Allen, Superintendent, Reserves and Trusts, Indian Affairs Branch:

> In making a final settlement with these Indians (Utikuma Lake and Lubicon) with regard to land due them, it is our opinion that the additional area should be based on present population instead of upon the number of Indians who have joined the band since the survey of the reserves at Utikuma Lake for the Utikuma Lake band. In this connection our reasons are based on the following points:
>
> (1) If the additional lands were to be based wholly on the number of non-treaty Indians who have joined the band since date of survey of their reserves in 1908-1909, this would leave out of consideration all descendants of these non-treaty Indians.
>
> (2) It is possible that some of the non-treaty Indians who joined are now dead and that others have left the band, – some commuted and transferred, – and consequently they should not be considered in the matter of additional lands for these bands. . . .
>
> A definite policy as to the basis of population which is to be used in the calculation of the areas to be requested to be set aside as reserves should be agreed upon by your branch as soon as possible.[84]

The struggle to define the policy had not been resolved by 1954:

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[83] ICC Transcript, May 24, 1995, pp. 206-07 (James Gallo).

[84] F.H. Peters, Surveyor General, to D.J. Allan, Superintendent, Reserves and Trusts, October 19, 1939, NA, RG 10, vol. 7777, file 27131-1 (ICC Exhibit 31, tab 7, pp. 3-5).

The problem is, basically, what date is to be selected for the purposes of determining the area of a Reserve for a Band, having in mind that under the Treaty the area is based on one square mile for each family of five.

The problem arises in this way. Some of our records clearly disclose that at the date a Reserve was set aside for a Band, in this type of case usually within a year or two after the Treaty, the Reserve was of a sufficient size to fulfil the Treaty obligation for the population of the Band at that date. However, there are a number of cases, probably more than we suspect, in which the Reserve or Reserves allotted to the Indians soon after the Treaty did not take up the entire land credit based on the population at the date of the Treaty. There are also a large number of cases, this applies throughout the Northwest Territories, where no Reserves have ever been established and hence the Treaty credit has not been used at all.

The obvious answer to the question of the date would seem to be the date of the Treaty, but it is doubtful if that can be accepted in most cases, for it is only in rare instances that we have any record of the population of the Band at the actual date of the Treaty. True, we usually have a figure showing the number of Indians for a particular Band at that date, but our records reveal in a great many cases dozens of names were added within the next few years on advice that small groups, usually stragglers from the main group, had been overlooked. In other cases it was not until several years after the Treaty that any accurate list of the Indians in a particular Band was compiled, because it was usually some years after the Treaty before the Reserve for the Band was established and the Indians settled thereon.

It has been suggested that in the case of a Band which has taken only part of its land credit, the date for determining the population for land credit be the date on which the Reserve or Reserves were first selected. On this same theory it would follow if, as in the case of the Northwest Territories, a Band had never taken up any part of its land credit and was now intending to to so, that the population as of the present would form the basis. There may be a good argument to support this theory. At first glance it would seem that Bands falling into these two categories would benefit to a greater extent than Bands who had taken their full land credit shortly after the Treaty, in the sense that the Band populations have

> generally increased over the last 75 years and that Bands now taking Reserves would receive a larger acreage. However, it must not be overlooked that these Bands have not derived any benefit from the lands they were entitled to over the past 75 years, whereas in many cases Bands that took their land credits have derived great benefit and in many instances built up substantial trust funds. I believe it is safe to say that in the majority of cases where a Band did take up its land credit, that Band is in a more advanced position today than a Band that did not and the Indians of the first Band certainly enjoy a more comfortable and, for the most part, economical existence. . . .
>
> I believe you will agree that this problem appears difficult of solution and has many ramifications, not the least of which will be the fact that it may be essential to reach agreement with each of the Provinces affected. In our view it is a problem which should have been met and solved years ago and it is strange that it has not been raised by one of the Provinces, for in recent years we have been asking the Province for land for Reserves and up to this date they have given us what we asked for without questioning the right of the Indians to receive the land under the terms of the Treaty. It is inevitable that one of these days we will be questioned as to the land credit to which a Band is entitled and if so, will be in the embarrassing position of having to advise that we cannot answer the inquiry.[85]

Twelve years later, the Department appeared to be no closer to establishing a policy, as reflected in virtually identical letters from H.T. Vergette to Alberta's Regional Director of Indian Affairs and to R.F. Connelly, Regional Director of Indian Agencies in Manitoba:

> This subject has been a matter of concern to both the Department and the Indians for a number of years. The most difficult problem we face is to determine the exact areas of land to which bands with unfulfilled credits

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[85] L.L. Brown, Superintendent, Reserves and Trusts, to W.M. Cory, Legal Advisor, April 9, 1954 (ICC Exhibit 31, tab 8, pp. 2-4).

are entitled. Where partial entitlement has been met, the calculations become increasingly difficult.

To date, there has been no firm statement of policy as regards satisfying land entitlement under the terms of the various treaties. I have examined correspondence on file at Headquarters and have been able to identify a number of precedents and principles which have governed negotiations with Provincial Governments over the years. Simply stated, these are as follows:

. . .

2) Acreage is calculated on the basis of band population at the time the reserves are selected. Where a band has received some of its entitlement, the area is reduced by the acreage already received. ...

The Legal Advisor reviewed this matter in 1954 and stated that there did not appear to be any possible way to give a firm legal opinion as to the rights of the Federal Crown to arbitrarily set the selection date for purposes of determining the reserve areas under the terms of the various Treaties. . . .

If you will refer to the Treaty 8 Commissioner's Report, page 5, you will note that at the time of the Treaty, Indians were "generally averse to being placed on reserves" and were "satisfied with the promise that this would be done when required." This seems to confirm the view that the establishment of reserves was to take place some time in the future and should be based on the population at the time of selection. . . .

We are unable, except in a few rare cases, to determine the population at the time the Treaty was signed. However, the changes in band membership for a number of reasons, particularly nomadic habits, transfers or movement between bands, divisions etc., have created a very complex problem. It is not simply a matter of selecting the figure from a paylist or census representing the total membership and using this as the basis for requesting a free grant of land from the Province, although this has been the method used most frequently. To be scrupulously fair, we should carefully examine the history of band organization and development from the signing of the Treaty until the present date to determine:

1) If there are any abnormal fluctuations in membership over the years.

2) If so, what are the reasons?
3) If the records reflect substantial increases in membership resulting from an influx of Indians from other bands which may have received their land entitlement.
4) In the case of new reserves, did these Indians once belong to a group for which lands have already been set apart?
5) Any other significant information having a bearing on land entitlement.[86]

Rem Westland, Director General of DIAND's Specific Claims Branch, confirmed that, in the 1960s and 1970s, the Department did not have a written or confirmed policy with regard to determining the amount of reserve land owed under treaty.[87]

Saskatchewan Formula

Although the Specific Claims Policy and the treaty land entitlement process are national in scope, these programs have taken on a distinctive flavour in Saskatchewan.

In the mid-1970s, Canada undertook a comprehensive review of potential outstanding treaty land entitlement claims in Saskatchewan. This process identified 12 bands as having valid entitlements,[88] which prompted Judd Buchanan, the Minister of Indian Affairs, to solicit the cooperation of Saskatchewan Premier Allan Blakeney in

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[86] H.T. Vergette, Head, Land Survyes and Titles, Indian Affairs Branch to Regional Director of Indian Affairs, Alberta, October 14, 1966 (ICC Exhibit 31, tab 10, pp. 1-3) and Vergette to R.F. Connelly, Regional Director of Indian Affairs, Manitoba, December 27, 1969, DIAND, file 574/30-4-22 (ICC Exhibit 31, tab 11, pp. 1-3).

[87] ICC Transcript, December 16, 1994, p. 123 (Rem Westland).

[88] The 12 bands were the Keeseekoose, Muskowekwan, Piapot, One Arrow, Red Pheasant, Witchekan Lake, Canoe Lake, English River, Lac La Hache, Peter Ballantyne, Fond du Lac, and Stony Rapids First Nations, subject to the subsequent removal of Lac La Hache by Canada as having received its current reserve as full and final settlement of its treaty land entitlement. See Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 3).

fulfillng these entitlements under the terms of the *Saskatchewan Natural Resources Act*.[89] In response to this request, the efforts of the Federation of Saskatchewan Indians Nations (FSIN) focused on determining the appropriate formula for settling land entitlements rather than on identifying additional bands with such entitlements.[90] Their efforts culminated in the letter from Saskatchewan dated August 23, 1976, agreeing to settle claims on the basis of what became known as the Saskatchewan formula:

> This formula would take "present population" x 128 (acres per person) less land already received. "Present population" means that the population is permanently fixed as at December 31, 1976.[91]

The Saskatchewan formula as proposed by the province was accepted by the federal Cabinet, and the Minister of Indian Affairs, Warren Allmand, confirmed this in writing to his provincial counterpart, Ted Bowerman, on April 14, 1977. Mr. Allmand and FSI Chief Ahenakew subsequently issued a press release in August 1977 to announce that the Saskatchewan formula represented "official agreement" on the means of fulfilling the outstanding treaty land entitlements of Saskatchewan First Nations.[92]

The beauty of the Saskatchewan formula was the simplicity of its operation, which involved two steps. The first was to determine whether a band had a land

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89 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 6).

90 Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 4).

91 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 6).

92 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, pp. 7-8).

shortfall as of date of first survey; if so, it had an outstanding entitlement. As explained by Sean Kennedy:

> Once you cleared that magic number, meaning you had more people in your band than you got land for, and even if it was one or two people, and even if preliminary research indicated that that was the case, you automatically got into the Saskatchewan formula.[93]

The second step determined the additional land that the band would receive by multiplying the band's population as of December 31, 1976, by 128, and subtracting the land already received. Because a defined "current" population was used to establish the quantum of entitlement, it became unnecessary to conduct extensive historical research to establish the precise shortfall forming the basis of the entitlement.[94]

Despite the apparent clarity of its concept, the Saskatchewan agreement proved to have complex and far-reaching implications which made it difficult to implement. First, settlements with many bands were constrained by a shortage of suitable unoccupied Crown land adjacent to or in the vicinity of existing reserves. This problem was magnified as the number of entitlement bands doubled between 1978 and 1984, resulting in the land due under the formula increasing from about 950,000 acres to 1.3 million acres.[95]

Purchasing privately owned land was one possible solution, but the federal and provincial governments disagreed on which level should bear the cost. The federal

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[93] ICC Transcript, November 18, 1994, pp. 29-30 (Sean Kennedy).

[94] Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 12).

[95] Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 10).

government claimed that it had provided sufficient land to the province in 1930 to satisfy the outstanding entitlements, but the province countered that the quantity of land was meaningless if that land was inappropriate in terms of location and quality. Moreover, providing occupied Crown land for settlement purposes also had drawbacks. Much of this land was used as community pasture under leases which had become, by virtue of custom and administrative policy, subject to virtually automatic renewal for the benefit of the lessees. As a result, these community pastures had become integral to the lessees' operations, and the lessees were understandably reluctant to give up their interests in these lands.[96]

Opponents of the Saskatchewan agreement found additional allies among Saskatchewan's rural municipalities and the Saskatchewan Wildlife Federation. The rural municipalities feared the erosion of their property tax bases if treaty land entitlement selections were made from lands within their boundaries. For its part, the Saskatchewan Wildlife Federation was concerned that increasing the size of reserves would extend treaty hunting rights and result in the destruction of wildlife habitat.[97]

Changes in the governments at the federal and provincial levels sealed the fate of the Saskatchewan formula. The province disowned it, and the federal government moved towards a position based on shortfall at date of first survey, reasoning that the Saskatchewan formula was simply too generous and created unfair windfalls for bands with outstanding entitlements based on very small shortfalls. At the same time, the bands grew increasingly frustrated with a process which, in their view, inappropriately

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[96] Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, pp. 12-14).

[97] Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 15).

put the third-party interests of Crown lessees and others first. Protracted dealings with these third-party interests resulted in delays which, with the continued growth of the Indian population, led to the fixed December 31, 1976, date of settlement population being perceived as an increasingly significant and onerous compromise by the bands. The increasing tensions eventually came to a head with the commencement of litigation in the Federal Court on March 16, 1989, by the FSIN and two First Nations.[98]

Claims Process, 1977-83

Although the Saskatchewan formula did not solve Saskatchewan's treaty land entitlement woes, work on treaty land entitlement claims nevertheless accelerated during its existence. As Kenneth Tyler testified, before records were readily available on microfilm and computers in the 1970s, it was difficult for a band to research a treaty land entitlement case. Most of the records were available only in Ottawa, and, with funding difficult to obtain, the expense of research made the cost of developing a claim prohibitive.[99]

These barriers to claim development started to come down in the early 1970s, particularly following Canada's confirmation in the 1973 *Statement on Claims of Indian and Inuit People* that it "recognized two broad classes of native claims – 'comprehensive claims': those claims which are based on the notion of aboriginal title; and 'specific claims': those claims which are based on lawful obligations."[100] The

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98 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, pp. 18-20).

99 ICC Transcript, May 24, 1995, pp. 64-65 (Kenneth Tyler).

100 DIAND, *Outstanding Business: A Native Claims Policy -- Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 13.

commitment of funds by government and, in some cases, by non-government organizations and band councils further enhanced claim activity.[101]

DIAND's Office of Native Claims, established in July 1974 "to review claims and represent the Minister and the Government of Canada in claims assessment and negotiation,"[102] found it necessary to modify the previous research criteria so that the claims submitted for review would comply with certain standards. The resulting guidelines, entitled "Criteria Used in Determining Bands with Outstanding Entitlements," appeared in August 1977 and provided as follows:

> Research to determine those Bands in Saskatchewan with outstanding treaty land entitlements was commenced in December, 1975. At this time an attempt was made to establish a series of basic criteria to be used in calculating entitlements. Basically, the approach taken was that entitlement would be calculated by multiplying the per capita entitlement set out in the appropriate Treaty by the total Band population at the date of first survey of Indian Reserve lands. The total amount of Reserve land received by a Band would be compared with this entitlement to determine whether it had been fulfilled or whether the Band was entitled to more land. As research progressed, it was often found necessary to modify the criteria to accommodate unique circumstances affecting individual Bands. However, such modifications were made only when absolutely necessary and in all other cases consistent application of the established criteria was maintained.
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> The following is a detailed outline of each of the criteria established, together with an explanation of any modifications found to be necessary during the course of research: . . .

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101 DIAND, *Outstanding Business: A Native Claims Policy -- Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 13.

102 DIAND, *Outstanding Business: A Native Claims Policy -- Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 13.

1. Date of First Survey

In most cases entitlement was calculated according to the population of a Band at the date of first survey. . . .

3. Population

Once the date at which entitlement was to be calculated had been established, the most accurate record of the Band population at that date was sought.

For any cases from 1965 onwards, the certified population figures published by the Indian Inuit Program Statistics Division were used. Statistics did not publish population figures prior to 1965 and, therefore, from 1951 onwards the membership rolls held by the Registrar provided the most accurate record of population. Prior to 1951, membership rolls were not kept and population figures were therefore taken from the treaty annuity paylists.

In determining the population from the treaty paylists, the figure used was that shown as "Total Paid" for the year in question. It should be noted that in using this figure, the following factors were not accounted for:

i) Band members absent at the time of treaty payment;

ii) New members subsequently adhering to treaty.

Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation.[103]

As these criteria suggest, Canada's initial position was that its treaty obligation was fixed as of the date of first survey of any land for a band, and did not increase thereafter with increases in population. However, this approach was viewed by the

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[103] DIAND, Office of Native Claims, "Criteria Used in Determining Bands with Outstanding Entitlements" (August 1977), 32-35 (ICC Exhibit 14).

FSIN and the bands as having certain inherent weaknesses. First, the approach did not permit entitlement to increase whether a band's population rose as a result of either natural increase or subsequent additions,[104] although the bands accepted that no new entitlement should arise where the only addition to population was by means of natural increase.[105]

Second, while paylists were accepted as a reasonable starting point for determining treaty land entitlement, it was considered that they did not always paint a true picture of band membership owing to absentees, members who elected not to adhere to treaty, and the general instability of band populations in the late 1800s.[106] The paylists had been designed to record the payment of annuities and, although in the absence of other evidence they constituted as accurate a record of band membership as was available at the time of survey,[107] they were "rather inadequate" for the purposes of a census record.[108]

Third, Canada originally considered the "base paylist" for treaty land entitlement purposes to be a band's paylist for the year in which the first survey for that band was prepared, regardless of whether the survey preceded or followed the payment of annuities in that year.[109] In circumstances where the first survey preceded the annuity

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104 ICC Transcript, May 24, 1995, p. 41 (Kenneth Tyler).

105 ICC Transcript, May 24, 1995, p. 39 (Kenneth Tyler).

106 ICC Transcript, May 24, 1995, pp. 44-45 (Kenneth Tyler); ICC Transcript, May 25, 1995, pp. 293-94 (Peggy Brizinski).

107 ICC Transcript, May 24, 1995, p. 195 (James Gallo).

108 ICC Transcript, May 25, 1995, p. 292 (Peggy Brizinski).

109 ICC Transcript, May 24, 1995, p. 16 (Kenneth Tyler).

payments in a calendar year, the bands were of the view that the surveyor would have had to rely on the paylist from the preceding calendar year to establish a band's population, with the result that a paylist from the same calendar year as the survey might have no realistic connection with the DOFS population used by the surveyor. Canada's policy would have worked a particularly harsh result in the case of the Thunderchild Band; following the initial survey in 1881, only six people showed up for annuity payments later that year. The Band's population had been substantially larger (although still not large enough to support an entitlement case) in 1880, and was larger yet in later years as a result of an influx of members from other bands, notably Thunder Companion, Napahase, and Young Chipewyan.[110]

Through ongoing consultation and negotiations between Canada and the First Nations, Canada began to make accommodations to recognize situations that did not fall neatly into the original DOFS position set forth in the 1977 criteria. For example, DIAND reopened the Thunderchild case and agreed to consider the 1880 and 1882 populations in establishing outstanding treaty land entitlement.

Another departure from the strict implementation of the 1977 criteria arose as a result of the claim of the Nut Lake Band, which involved a new band formed after a band split. The initial paylist review had concluded that the Band's treaty land entitlement based on its 1881 DOFS population had been fulfilled, and therefore no outstanding obligation appeared to be owing. However, closer scrutiny of the paylists showed that, in making annuity payments, the Indian agents had, in applying the "two-year rule," paid two instalments of arrears to certain individuals on the base paylist but did not include them in the numbers paid for the current year. Thus the administrative

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110 ICC Transcript, May 24, 1995, pp. 36-38 (Kenneth Tyler).

convenience of the "two-year rule" resulted in an inaccurate reflection of the Band's population as of date of first survey, and thereafter DIAND became prepared to consider absentees in establishing DOFS population. As Kenneth Tyler commented in his report, the Nut Lake case "may have contributed to the Department's change of policy, and its adoption of the principle . . . that the population figures employed in entitlement calculations should be based upon the best evidence of the true population of the Band on the actual date in question."[111]

Canada also accommodated the Saulteaux Band, for which reserve lands reflecting a population of some 75 people had been surveyed in 1909. The members of that Band refused to adhere to treaty until 1954, when 69 members of the Band did so. Further adhesions began to take place in 1956. The formal adhesion document provided that, in consideration for the Band members agreeing to abide by and carry out the terms of the treaty, Canada agreed that "all the payments and provisions named in the said treaty to be made to each Chief and his Band shall be faithfully made and fulfilled to the aforesaid Indians."[112] The unique aspect of these adhesions was that they were by individual band members and not the band, as had been the case with previous adhesions to treaties. Subsequently, in the 1970s, based at least in part on the solemn promises contained in the formal adhesion documents, Canada assumed responsibility for fulfilling unsatisfied obligations, including treaty land entitlement.[113]

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111 Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 17).

112 *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians* (Ottawa: Queen's Printer, 1964), 29 (ICC Exhibit 15).

113 ICC Transcript, May 24, 1995, pp. 16-21, 53 (Kenneth Tyler).

As a result of the Saulteaux case, Canada re-examined its criteria for dealing with treaty land entitlement. This process led G.A. Wyman, the Director of the Specific Claims Group, DIAND, to advise Anita Gordon, the Director of Research for the Federation of Saskatchewan Indian Nations, on April 23, 1979, of the basis on which the Department had approved consideration of late adherents as "additional criteria for validating entitlements":

> The department has agreed in principle that bands are entitled to additional reserve land on account of late adherents to treaty, both formal (i.e., those who were party to a formal adhesion to treaty) and informal (in other words, those who were simply added to a band's paylist by the Indian Agent without a formal adhesion being taken). The term "late adherents" is used here to mean a native person who takes treaty for the first time, none of whose forebears had ever previously taken either treaty or scrip. . . .
>
> In calculating the entitlement due to a band on account of its taking late adherents into membership, the department is prepared to proceed as follows. As a first step, the band's original entitlement, according to its population at the date of first survey, would be determined. To this would be added the per capita treaty allotment (usually 128 acres) for each late adherent (excluding descendants) to arrive at a "total entitlement" for the band. If this "total entitlement" has been met, then the band would not be deemed to have an outstanding entitlement today. If, on the other hand, the band has not received enough land to meet this "total entitlement," then an outstanding entitlement would be recognized.[114]

Although this statement of the Department's position represented a significant breakthrough for bands seeking to establish outstanding treaty land entitlement, the "proposed calculation procedure was still not acceptable to the Federation or to

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[114] G.A. Wyman, Director, Specific Claims Group, Office of Native Claims to Anita Gordon, Director of Research, FSI, April 23, 1979 (ICC Documents, pp. 163-64).

entitlement bands, because it still insisted on deeming new adherents to Treaty to have entered at a time when they did not enter, and deeming lands to have been received when they had not been received."[115]

Nevertheless, in light of the policy set forth in Ms. Wyman's letter, there was, according to Mr. Tyler, no doubt that the subsequent claim of the Pelican Lake Band (previously known as the Chitek Lake Band) would be accepted for negotiation, even though the claim was based entirely on new adherents to treaty. The real question was the basis on which the claim would be approved. In 1921, a reserve of approximately 8630 acres, enough land for 68 people, was selected at a time when the number of members of the band who had adhered to treaty was 42. Consequently, the band's treaty land entitlement appeared to have been fulfilled. However, a significant number of band members had not adhered to treaty. In 1949 and 1950 a total of 58 band members started receiving treaty annuities and, although they had been members all their lives, the Department admitted them as new members of the band rather than as, in Ms. Wyman's terms, informal late adhesions to treaty.

Under the terms of the Saskatchewan formula, the Band would have been entitled to land on the basis of its December 31, 1976, population, less land already received. However, the Band chose to take a "principled" approach to its land entitlement, even though this resulted in a smaller claim. The position of the Band and the Federation of Saskatchewan Indian Nations was that, once sufficient land had been set aside for a band, the question of treaty land entitlement "could not be re-opened on the basis of natural increase, but only as a result of the addition of new members who

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115 Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, pp. 11-12).

had never been provided for elsewhere."[116] Mr. Tyler discussed this issue in his letter of March 24, 1980, to Graham Swan of DIAND's Office of Native Claims in reference to a report prepared by Brendan Hawley setting forth a proposed basis of settlement:

> Mr. Hawley's report concludes that the Saskatchewan Formula ought to be applied to the entire population of the band, and that land ought to be provided on the basis of the 31 December, 1976 total membership. In my opinion this goes considerably beyond the Governments [sic] obligation under the [Saskatchewan] formula. This would become quite apparent if one were to consider the not at all unlikely possibility that a band may have had its Treaty land entitlement exactly fulfilled fifty or one hundred years ago, with only a very few surplus acres provided. If one person were to have adhered to Treaty with such a band in the early 1970's, by the logic of the conclusion in Mr. Hawley's report, the Government of Canada would be obligated to provide sufficient land to the band to accommodate this new adherent and the total population increase of the entire band from the date of survey until 31 December, 1976. Such an interpretation of the Saskatchewan Formula would have made a non-Treaty Indian an extremely valuable asset indeed to a great many bands.[117]

Ultimately, the settlement with Pelican Lake used a modified form of the Saskatchewan formula, which took the percentage represented by the number of new adherents divided by the total population (obtained by combining the new adherents with the DOFS population), and applied that percentage to the Band's land entitlement based on its population at December 31, 1976. This approach was detailed in the June

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[116] Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 14).

[117] Kenneth J. Tyler, Tyler Wright & Daniel Limited, to Graham Swan, Office of Native Claims, March 24, 1980 (ICC Documents, pp. 175-76).

25, 1980, reply to Mr. Tyler from J.R. Goudie, Acting Director, Office of Native Claims:

> As an alternative I would suggest that the entitlement of the Chitek Lake Band be calculated on the basis of the percentage by which the band's original entitlement (at the date of first survey – or in this case selection) was increased as the result of the influx of new adherents. This percentage would then be applied to the band's December 31, 1976 population, as per the Saskatchewan formula. Under this proposal, the entitlement of the Chitek Lake Band would be calculated as follows:

(i) Population at date of selection/survey (1921)	42
(ii) New adherents	57
(iii) Total	99
(iv) Adherents as % of total population 57/99x100-	57.5%
(v) 57.5% of December 31, 1976 entitlement	21,915 ac
(vi) less surplus lands provided 1921	3,254 ac
(vii) outstanding entitlement	8,661ac[118]

As Mr. Kennedy testified, the result in Pelican Lake used the same validation process as the Saskatchewan formula, although the quantum was different:

> Well the lands they would get under the Saskatchewan formula, the quantum was different, yes, but the actual validation was not different. There was no distinction. What you did is look at everybody. There was no distinction. We didn't stop at shortfall and then go beyond. We just looked at everybody. And if there was "X" number of people, times the acreage in the treaty, then you looked at how much the land the shortfall amount was, if there was indeed a shortfall. Then you looked at the

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[118] J.R. Goudie, Acting Executive Director, Office of Native Claims, to Kenneth J. Tyler, Tyler, Wright & Daniel Limited, June 25, 1980 (ICC Documents, p. 179).

> formula. And if they were one of these bands that had a specific situation, then you modified the formula. That was actually a political decision.[119]

The novelty of the Pelican Lake settlement was confirmed by Member of Parliament Bernard Loiselle, the Minister of Indian Affairs' special representative for entitlements, to Saskatchewan Minister Ted Bowerman:

> I am enclosing a copy of a letter which I have sent to Chief Leo Thomas of the Pelican Lake Band. It confirms that the federal government recognizes that the band has a valid claim to additional land under treaty.
>
> There is one unique aspect to this entitlement, namely that the entitlement pertains to late adherents only. The entitlement of the original members of the Pelican Lake Band was met when their reserve was selected in 1921. However, in 1949 some 57 non-treaty Indians adhered to treaty and became members of the band, but no additional reserve land was ever provided on their account. Consequently, the entitlement due to the band today is on account of these adherents only. The band and the federal government have agreed that a modified version of the Saskatchewan formula would be appropriate in this case.[120]

Government policy at the time was enunciated even more clearly in another letter from Mr. Loiselle, this one sent to Chief Gordon Oakes of the Nikaneet Band on October 3, 1980. After confirming that the Band's claim to treaty land entitlement had been approved, Mr. Loiselle continued:

> I would like to set out for you the basis for this decision. Firstly, every treaty Indian has a right to be included in the allotment of reserve land for some band. As the ancestors of the Nikaneet Band members could not be

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119 ICC Transcript, November 18, 1994, p. 89 (Sean Kennedy).

120 Bernard Loiselle to the Honourable Ted Bowerman, Minister of Environment, Province of Saskatchewan, September 22, 1980 (ICC Documents, p. 183).

> shown to have been included in the reserve allotment of other bands it was possible to recognize an entitlement for the Nikaneet Band. Consequently acting on behalf of the Minister I have determined and here confirm for you, that the Nikaneet Band is recognized as having an outstanding treaty land entitlement.[121]

Earlier in 1980, as a result of an agreement between Mr. Loiselle and FSI Chief Sol Sanderson,[122] a joint committee of the Federation of Saskatchewan Indians and the Department of Indian and Northern Affairs was struck "to come to a quick but common set of findings on each entitlement case and to avoid duplication of work."[123] The committee researched and evaluated each claim under the supervision of the Office of Native Claims using the validation criteria established by the Department of Justice.[124] The committee's joint reports set forth recommendations which were then presented to the ONC for review of the claims.[125]

In 1982 the joint committee recommended that Canada accept the claims of the Poundmaker, Moosomin, Onion Lake, and Sweetgrass Bands for negotiation. These claims represented another new precedent in the validation process since they were

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121 Bernard Loiselle, Member of Parliament to Chief Gordon Oakes, Nikaneet Band, October 3, 1980 (ICC Exhibit 18, tab 28, p. 1).

122 ICC Transcript, May 24, 1995, pp. 72-73 (Kenneth Tyler).

123 M.A. Inch, Acting Director, Specific Claims, Office of Native Claims, to Marla Bryant, January 18, 1982 (ICC Documents, p. 184).

124 M.A. Inch, Acting Director, Specific Claims, Office of Native Claims, to Marla Bryant, January 18, 1982 (ICC Documents, p. 184).

125 ICC Transcript, November 18, 1994, p. 87 (Sean Kennedy); ICC Transcript, May 24, 1995, pp. 72-73 (Kenneth Tyler).

based on "landless transfers," which were distinguished by the committee from ordinary interband transfers:

> C. Transfers from Landless Bands
>
> Indians who transfer from one band to another are not taken into account in determining a band's population for entitlement purposes. To do so would involve a great deal of research, and would present considerable practical difficulty. If it is argued that a band is entitled to receive land for an Indian who transfers into it from another band, then by the same token the band he left should lose that individual's entitlement. This latter result, of course, is not feasible. In consequence, neither transfers into, nor out of, a band are considered for entitlement purposes.
>
> There are, however, cases where an Indian has transferred from a band which had not received land to one which had already had its reserve surveyed. Under the present policy this Indian would not be counted in either band and would thus never receive his per capital land entitlement.
>
> We believe that consideration should be given to taking transfers *from landless bands* into account for entitlement purposes, as long as the transferee was not counted for entitlement purposes with any other band.[126]

When asked whether the joint committee's recommendations with respect to landless transfers and band amalgamations should be referred to the Saskatchewan government to confirm its concurrence, J.D. Leask, Director General of Reserves and Trusts, considered it unnecessary:

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[126] Joint FSI/DINA Committee on Entitlement, "Report No. 7 – Poundmaker Band #114" [1982] (ICC Documents, pp. 187-88). See also "Report No. 8 – Onion Lake Band #119/#120," "Report No. 9 – Moosomin Band #112," and "Report No. 13 – Sweetgrass Band #113," all within ICC Documents Addendum, vol. 2, tab G.

> It is proposed to seek the Province's agreement to include two new validation criteria (transfers from landless Bands and Band amalgamations) in the Saskatchewan Formula. . . .
>
> To my mind the 1976/77 agreement with the Province and the FSI already deals with this. The agreement states that Bands with a valid entitlement may use the Formula (i.e. their 1976 population) to calculate their entitlement. Neither the agreement nor the Formula deals with validation criteria at all; hence, new criteria do not have to be "included in the Formula." If Justice advises that landless transfers and Band amalgamations are valid grounds for an entitlement, then the Saskatchewan Formula automatically applies under the terms of the 1976/77 agreement. The only question is whether Bands validated on this basis should receive the full benefit of the Formula, since their original entitlements at date of first survey were satisfied. We have already established precedents for the use of a percentage formula in such cases at Chitek Lake and Beardy's/Okemasis. This was done with the concurrence of the Province and the FSI. I suggest that we have no choice but to stand by these precedents . . . which, to my mind, constitute a ready-made mandate for the federal negotiator. His job should be to confirm that the new provincial government accepts this approach. Since the effect of the percentage formula is to reduce the amount of land owed to a Band, I cannot imagine Saskatchewan will object, unless they intend to renege on the whole Saskatchewan formula.[127]

Mr. Leask also provided a basis for distinguishing between the claims of new adherents and landless transfers:

> [R]eference is made to the Nikaneet situation in the context of the Chitek Lake entitlement. I do not believe there is a strong connection between the two. Chitek Lake involved new adherents to treaty who, Justice advised, have a legal right to the same treaty benefits accorded to the

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[127] J.D. Leask, Director General, Reserves and Trusts, to R.M. Connelly, Director, Specific Claims Branch, Office of Native Claims, November 15, 1982 (ICC Documents, pp. 197-98).

> original signatories of the treaty, including reserve land. The Nikaneet claim established the principle that all treaty Indians are entitled to be counted in some Band or other for entitlement purposes. This relates much more directly to the transfers from landless Bands criteria. . . .[128]

It is worth highlighting the context in which developments in treaty land entitlement at that time were occurring. In 1982 the federal government issued *Outstanding Business*, which reiterated the concept of "lawful obligation" as the basis of Specific Claims Policy:

> The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.[129]

In particular, the government indicated its willingness in the negotiation process to forego the legal and equitable defences of limitations and laches, although it retained the right to rely on those defences for claims ending up in court. The policy also clearly established the process for dealing with specific claims, including the format for presentation of claims, the review of claims by the ONC, the determination of the acceptability of claims based on legal advice from the Department of Justice, and

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[128] J.D. Leask, Director General, Reserves and Trusts, to R.M. Connelly, Director, Specific Claims Branch, Office of Native Claims, November 15, 1982 (ICC Documents, p. 198).

[129] DIAND, *Outstanding Business: A Native Claims Policy -- Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 19.

ultimately resolution of claims through negotiation. The impact of the policy was that, whereas the Department of Justice had previously been involved in the validation process only as its input was required on specific issues, it subsequently reviewed all claims to determine whether a lawful obligation was owed by Canada to the claimant bands.[130]

On December 1, 1982, the claims of the Joseph Bighead, Poundmaker, Sweetgrass, and Mosquito/Grizzly Bear's Head Bands were accepted for negotiation, and the bands and the Saskatchewan government were duly informed.[131] The Joseph Bighead Band was considered eligible for full application of the Saskatchewan formula because it had established a date-of-first-survey shortfall. On the other hand, Poundmaker, Sweetgrass, and Mosquito/Grizzly Bear's Head, like Pelican Lake before them, obtained approval for a percentage application of the formula since, in the first two cases, the claims were based solely on late adherents and, in the third case, the claim arose from a band amalgamation. With respect to the Poundmaker and Sweetgrass claims, W.J. Zaharoff, a senior claims analyst with the Specific Claims Branch, ONC, advised Graham Powell, Executive Director of Saskatchewan's Department of Intergovernmental Affairs (and in the process demonstrated the involvement of the Department of Justice in the validation process):

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130 ICC Transcript, November 18, 1994, pp. 32-33 (Sean Kennedy).

131 John C. Munro, Minister of Indian Affairs, to Chief Ernest Sundown, Joseph Bighead Band, December 1, 1982 (ICC Exhibit 18, tab 5); Munro to Chief Henry Favel, Poundmaker Band, December 1, 1982 (ICC Exhibit 18, tab 20); Munro to Chief Gordon Albert, Sweetgrass Band, December 1, 1982 (ICC Exhibit 18, tab 24); Munro, to Chief Douglas Moosomin, Mosquito/Grizzly Bear's Head Band, December 1, 1982 (ICC Exhibit 18, tab 9); Munro to J. Gary Lane, Minister of Intergovernmental Affairs, Province of Saskatchewan, December 1, 1982 (ICC Documents, p. 203). The appendices (showing treaty land entitlement calculations) attached to the letters to the Chiefs of the Poundmaker and Sweetgrass Bands clearly show that those Bands were considered to have received a DOFS surplus.

> The Poundmaker and Sweetgrass Bands were provided with enough land to satisfy their treaty land entitlements based on the band's population at date of first survey. However, people later transferred into these bands which had not yet received treaty lands. Our research has indicated that none of these transferees were ever counted in the treaty land entitlement calculation for any other band. Our legal counsel advises us that each Indian is entitled, under the terms of Treaty 6, to be counted in the population base used to calculate the Crown's overall liability, provided that he or she has not been included in an entitlement calculation elsewhere. The Department of Justice has taken the position that, since the Indians who transferred to the Poundmaker and Sweetgrass Bands had never been included in such a calculation, the two Bands have an outstanding treaty land entitlement.[132]

Mr. Zaharoff also explained the basis of employing a percentage application of the Saskatchewan formula:

> There are several reasons why it is both logical and consistent to use a percentage calculation in applying the Saskatchewan Formula to claims of these two general types [ie., landless transfers and band amalgamations]. Basically, where the original entitlement to a band was met at date of first survey, it does not seem reasonable to re-open the entire claim of the band when only a certain group of individuals are responsible for the outstanding entitlement. It seems more appropriate that the land quantum calculations should be relative to that portion of the band which has not been included in the population base used to determine the treaty land entitlement.
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> It was also important to ensure that these claims were dealt with fairly within the spirit of the 1977 Agreement. A percentage formula was developed based upon those individuals who had not been included in the

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[132] W.J. Zaharoff, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims to Graham Powell, Executive Director, Intergovernmental Affairs, Province of Saskatchewan, December 13, 1982 (ICC Documents, p. 207).

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> calculations providing treaty lands, using the band's December 31, 1976 population. All three parties have agreed to this percentage calculation in previous cases, and it is now an integral part of the 1977 Saskatchewan Agreement.[133]

Similar letters confirming the acceptance of the treaty land entitlement claims of the Moosomin and Onion Lake Bands were forwarded to the respective Chiefs of those bands in 1983.[134] Moreover, although the claim of the Ochapowace Band was rejected in the first instance on the basis of preliminary research showing that the band had received sufficient land at the date of first survey to satisfy its treaty land entitlement, R.M. Connelly, Director of the Specific Claims Branch, ONC, informed Chief Morley Watson on October 28, 1983, that the claim might yet be resurrected on the basis of further research confirming possible "late additions" to the band's population:

> "Late additions" are persons who join a band after a reserve has been set aside, and who have never been included in a population base for a reserve survey for any other band. This includes late adherents to treaty and persons who have transferred from another band but had not been included in a reserve survey. Each treaty Indian is entitled to be included once in the population base for a reserve survey as a member of a specific band, therefore, these "late additions" are entitled to be included in the population base of the band of which they become members. . . .

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133 W.J. Zaharoff, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims, to Graham Powell, Executive Director, Intergovernmental Affairs, Province of Saskatchewan, December 13, 1982 (ICC Documents, pp. 208-09).

134 John C. Munro, Minister of Indian Affairs, to Chief Ernest Kahpeaysewat, Moosomin Band, March 25, 1983 (ICC Exhibit 18, tab 8); Munro to Chief Leo Paul, Onion Lake Band, October 12, 1983 (ICC Exhibit 18, tab 16). As with the letters to the Chiefs of the Poundmaker and Sweetgrass Bands, the appendices (showing treaty land entitlement calculations) attached to the letters to the Chiefs of the Moosomin and Onion Lake Bands also show that those bands were considered to have received a DOFS surplus.

> Should this research identify at least 8 persons as bonafide late additions to the Ochapowace Band and they be acceptable to the Department of Justice as members, then your band will have a valid claim to outstanding treaty land entitlement.[135]

Ultimately, after further research, the Band's claim was accepted for negotiation on April 19, 1984,[136] not on the basis of late additions but "on the strength of its two component Bands' populations at 'the date of first survey' itself; enough acceptable 'temporary absentees' in 1881 were identified to satisfy the federal government."[137]

1983 ONC Guidelines

The 1983 ONC Guidelines were produced in May of that year through the joint efforts of Sean Kennedy of the ONC and lawyer Stuart Archibald of the Department of Justice. The purpose of the Guidelines was not only to assist Canada's claims analysts with their review of future claims originating in Saskatchewan and other provinces, but also to let Indian organizations and bands researching claims know what the Department expected of them.[138] For this reason, the Guidelines were widely distributed until at least mid-1991 as the federal practice on the validation of entitlements.[139]

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135 R.M. Connelly, Director, Specific Claims Branch, Office of Native Claims, to Chief Morley A. Watson, Ochapowace Band, October 28, 1983 (ICC Documents, p. 222).

136 John C. Munro, Minister of Indian Affairs, to Chief Morley A. Watson, Ochapowace Band, April 19, 1984 (ICC Exhibit 18, tab 13).

137 Stewart Raby, Federation of Saskatchewan Indian Nations, to Wilma Jackknife for Indian Claims Commission, June 12, 1994 (ICC Documents, p. 410).

138 ICC Transcript, November 18, 1994, pp. 44-45 (Sean Kennedy).

139 Stewart Raby, Federation of Saskatchewan Indian Nations, to Wilma Jackknife for Indian Claims Commission, June 12, 1994 (ICC Documents, p. 410).

The Guidelines have been referred to extensively in the submissions of the Kawacatoose First Nation in the present inquiry and we will therefore set out the relevant provisions in some detail:

> *The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.*
>
> The following criteria are intended as guidelines in the research and validation process for treaty land entitlement claims. They have evolved from historical research done by the Office of Native Claims (ONC) in consultation with the Federal Department of Justice, and in consultation with the research representatives of the claimant bands. Each claim is reviewed on its own merits keeping in mind these guidelines. However, as experience has taught, new and different circumstances have arisen with each claim. Therefore, the review process is not intended to be restricted to these guidelines.
>
> Determining a Band's treaty land entitlement involves five basic steps:
>
> 1) Identification of the band and the applicable treaty.
> 2) Determination of the relevant survey date.
> 3) Determination of the total lands received by the band.
> 4) Determination of the population base.
> 5) Overall entitlement calculations.
>
> . . .
>
> **D. Population Base for the Determination of an Outstanding Land Entitlement**
>
> An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less [than] what the band was entitled to receive under the terms of the treaty which the band adhered [to] or signed. This is referred to as a shortfall of land. *There are two situations where a shortfall may exist. The first is when*

the land surveys fail to provide enough land to fulfill the entitlement. The second is when new members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled. The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. The only records which recorded membership of Indians in the bands prior to 1951 were the annuity paylist and the occasional census. The annuity paylists are what is generally relied upon in order to discover the population at the date of first survey. This is done by doing an annuity paylist analysis.

In paylist analysis, all individuals being claimed for entitlement purposes are traced. This includes a review of all band paylists in a treaty area for the years that an individual is absent, if necessary. All agent's notations are investigated regarding the movements, transfers, payment of arrears, or any other event that affects the status of a band member. A ten to fifteen year period is ususally [sic] covered depending on the individual case. This period would generally begin at the time the treaty was signed, through the date of first survey and a number of years afterwards. Where a claim depends solely on new adherents or transfers from landless bands, the band memberships may be traced through to the present day.

The following principles are generally observed in an annuity paylist analysis:

Persons included for entitlement purposes:

1) Those names on the paylist in the year of survey.

2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.

Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.

3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.

4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.

5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to Treaty.

Persons not included

1) Absentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership in the band i.e.: they are away most of the time. However, these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.

2) Where the agent's notes in the paylist simply states "married to non-treaty," those people are not included. They could be non-native or métis and therefore ineligible.

3) Where the agent's notation simply reads "admitted" (which often meant admitted to band and not to treaty) and no letter of admission to treaty can be found, these persons are excluded.

4) Persons who are not readily traceable . . .

5) Persons who were included in the population base of another band for treaty land entitlement purposes.

6) Persons names which are discovered to be fraudulent.[140]

Mr. Kennedy testified at length before the Commission with regard to the 1983 ONC Guidelines. He did not view them as a radical departure from the previous process for dealing with treaty land entitlement claims. "We just put on paper what we did."[141] Mr. Westland, on the other hand, contended that the Guidelines were not "speaking to a consistent way to do business" or there would have been no need for them in the first place.[142]

Mr. Kennedy considered that the Guidelines were used by the Department for both claims research and validation. Although an important aspect of substantiating a claim at that time was to establish a lawful obligation owed by Canada to a band, that meant more than just a DOFS shortfall:

> The government's position at the time was that you had to determine the extent of lawful obligation which meant shortfall.
>
> Now as I say, we're all hearing this shortfall date of first survey. All the date of first survey ever was was a starting point. You started with that paylist, and you worked everything else afterwards. It wasn't just the shortfall at the date of first survey, even in the earlier claims.[143]

According to Mr. Kennedy, Canada viewed its lawful obligation as including not just individuals on the base paylist, but also later additions. Even if a band's treaty land

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140 DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, pp. 213 and 215-16) Emphasis added.

141 ICC Transcript, November 18, 1994, p. 88 (Sean Kennedy).

142 ICC Transcript, December 16, 1994, p. 79 (Rem Westland).

143 ICC Transcript, November 18, 1994, p. 42 (Sean Kennedy).

entitlement was fulfilled at DOFS, the quantum could be reconsidered if later additions to the band's population created a shortfall. It was only if a band had received enough land to satisfy its DOFS population together with later additions that its claim would be rejected.[144]

Mr. Westland disagreed. He viewed the Guidelines' second basis for a shortfall – "when new members who have never been included in a land survey for a band join a band that has had its entitlement fulfilled" – as flawed and illogical in the context of treaty land entitlement understood as a collective right of a band and not a right of individual Indians.[145] For the same reason, he considered the Guidelines' opening statement of principles – that each band is entitled to a certain amount of land based on the number of its members, and that each treaty Indian is entitled to be included in an entitlement calculation as a member of a band – to be in error. Nevertheless, he acknowledged that claims had been accepted for negotiation on the basis of those principles but without a lawful obligation to do so:[146]

> I don't think that it would [be] because anyone was misled. I think that there was an understanding at that time. These guidelines created a certain kind of mind set. There were acceptances to claims that were recommended to the Minister. I don't think any minister would have been aware of those guidelines, for example. And the Minister acted on recommendations from officials as is proper in the system. I think the times were different. The attention being paid to the fundamentals of policy was a little different –[147]

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144 ICC Transcript, November 18, 1994, pp. 49-51 (Sean Kennedy).

145 ICC Transcript, December 16, 1994, pp. 91-92 (Rem Westland).

146 ICC Transcript, December 16, 1994, pp. 77 and 84 (Rem Westland).

147 ICC Transcript, December 16, 1994, pp. 77-78 (Rem Westland).

Mr. Kennedy considered it to be government policy in 1983 that each Indian was entitled to be counted for treaty land entitlement purposes, provided that he or she had not been counted with another band or taken scrip. Therefore, a band's entitlement was deemed to increase if its membership was increased by the addition of individuals who had not received land elsewhere.[148] Late adherents would be treated like a separate band that had never adhered to treaty: until adhesion, their right to receive land under treaty would grow (or, presumably, diminish) with the growth (or decline) in population of the late adherent group. That right would not be reduced, however, as a result of reductions in the population of the band to which they were adhering since the treaties provided land on the basis of 128 acres per person.[149] There was, however, no obligation to provide additional land to descendants of individuals who had already been counted for treaty land entitlement.[150] Where individuals had been members of more than one band for periods of time, it became necessary for the ONC to exercise its judgment by performing a "fairness assessment" to determine the band with which those individuals should be counted.[151]

In Mr. Kennedy's opinion, a claim like that of the Kawacatoose First Nation probably would have been accepted for negotiation if it had been submitted to the ONC in 1982 or 1983 when the Guidelines were being applied.[152]

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148 ICC Transcript, November 18, 1994, p. 93 (Sean Kennedy).

149 ICC Transcript, November 18, 1994, pp. 109-10 (Sean Kennedy).

150 ICC Transcript, November 18, 1994, pp. 112 and 115-16 (Sean Kennedy).

151 ICC Transcript, November 18, 1994, p. 120 (Sean Kennedy).

152 ICC Transcript, November 18, 1994, pp. 52-53 (Sean Kennedy).

REPORT OF THE OFFICE OF THE TREATY COMMISSIONER

While several Saskatchewan bands managed to have their claims accepted for negotiation in the context of the Saskatchewan formula, few claims were settled. As discussed previously, mounting frustration with the process eventually led the FSIN and the Chiefs of the two representative bands to commence litigation on March 16, 1989, in Federal Court.

However, the parties quickly recognized that the courts were not the best forum for the resolution of treaty land entitlement,[153] and, on June 8, 1989, the Office of the Treaty Commissioner was created by agreement of the FSIN and the Minister of Indian Affairs and Northern Development. The OTC was to direct the resolution process and to make recommendations to permit a negotiated settlement. This entailed devising solutions acceptable to both parties, which meant recognizing that Canada would not agree to a proposal based on current population settlements, the bands would not deal on the basis of DOFS shortfall, and neither side would accept a solution reminiscent of the Saskatchewan formula since that was the reason for the litigation in the first place.[154]

After considering contemporary judicial authorities on treaty interpretation, the OTC formulated six principles to guide its examination of the treaty land entitlement issue:

1. The treaty should be given a fair, large and liberal construction in favour of the Indians.

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153 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 22 (ICC Exhibit 4).

154 ICC Transcript, May 24, 1995, pp. 200-01 (James Gallo).

2. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians.

3. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.

4. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.

5. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.

6. The treaty was made with Indians not bands, and an examination of the treaty as a whole indicates that most terms are intended to treat individual Indians equally, and bands in proportion to their populations.[155]

The product of the OTC's deliberations was the "equity formula," which, according to its architects, effectively reconciled the divergent positions of the parties based on date-of-first-survey shortfall on the one hand and current population on the other. The formula multiplied a band's current population by the treaty formula of 128 acres per person, and in turn multiplied that figure by the band's shortfall of land expressed in percentage terms. From the ensuing acreage would be subtracted the number of acres already received, leaving the band's residual treaty land entitlement. As the OTC Report comments in relation to the formula:

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155 C. F. Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 24 (ICC Exhibit 4).

> [I]t is "shortfall" in the sense that the descendants of those families which were never counted in the first survey are now accounted for – a "first survey," if you will, for these people whose numbers are expressed as a percentage of the band population as a whole. It is also "contemporary population" in the sense that the percentage of land originally owing to a band is applied to the present day population of that band and multiplied by 128 acres per person to arrive at the land quantum now due.[156]

Other aspects of the OTC's suggested solution included adoption of the paylist immediately preceding a band's initial survey as the band's base paylist,[157] and the recommendation of a "a very large purchase policy" to overcome the problems which plagued the 1976 Saskatchewan agreement.[158]

The OTC concluded that the equity formula was to be preferred to proposals based on current population, which, despite having historical precedents, skewed settlements in favour of the Indians. Formulae based on date of first survey were also rejected because they did not account for absentees and late additions, and were not supported by any legal or historical precedents, notwithstanding DIAND's assertion that they amounted to Canada's lawful obligation under treaty. The equity formula, in contrast, was considered to be equitable among bands, consistent with the six principles of treaty interpretation, and in accordance with the historical precedents established in

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156 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 46 (ICC Exhibit 4).

157 ICC Transcript, November 18, 1994, pp. 60-61 (Sean Kennedy).

158 ICC Transcript, May 24, 1995, pp. 202-03 (James Gallo).

the percentage applications of the Saskatchewan formula to bands such as Pelican Lake, Poundmaker, Sweetgrass, Moosomin, and Onion Lake.[159]

Unlike the Saskatchewan formula, which based settlements on a current population fixed at December 31, 1976, the equity formula placed a much greater emphasis on historical figures and research because each band's shortfall had to be converted to a percentage of its DOFS population. Preliminary shortfall numbers had been obtained from the Specific Claims Branch of DIAND prior to the OTC Report being tabled in May 1990, but by that July it was recognized that the approach to deriving the figures was not consistent from band to band.[160] However, in the fall of 1990 as new research was being undertaken to review the historical figures, Manfred Klein, Director of Specific Claims, forwarded his submission to the federal Cabinet recommending acceptance of the OTC Report based on the original research. Cabinet accepted the recommendation, following which the revised research was completed. The difference between the cost estimates based on the original research and those based on the revised research was substantial, and Mr. Klein asked Mr. Kennedy to review all outstanding claims to determine whether the categories in the 1983 ONC Guidelines could be used to reduce Canada's obligations to levels that would "fit" the expenditures already approved by Cabinet.[161] In Mr. Kennedy's view, it was possible that the reason that the DOFS threshold policy had resurfaced was that the cost of

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159 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 40-41 and 44-47 (ICC Exhibit 4).

160 ICC Transcript, May 25, 1995, pp. 262-64 (James Gallo).

161 ICC Transcript, November 18, 1994, p. 56 (Sean Kennedy).

settlement would be too high if additional categories of people were to be included in the determination of a band's shortfall.[162]

"Lawful Obligation" and the Saskatchewan Framework Agreement

In the aftermath of Cabinet's approval of the OTC Report, there was little immediate evidence to suggest that Canada's interpretation of its lawful obligation to Indian bands in relation to treaty land entitlement was being reconsidered. Indeed, the claim of the Cowessess Band was being reviewed having regard for the new principles which had been developed by Canada since its previous rejection of the claim in the 1970s. As Al Gross, then a negotiator with Specific Claims West, informed Chief Lionel Sparvier on July 23, 1991:

> So that there is no misunderstanding regarding the reassessment of the Cowessess Band's treaty land entitlement claim, let me explain the usual process which all treaty land entitlement claims go through before they can be validated. First, the band or an Indian organization on behalf of the band, submits a thoroughly researched claim to Specific Claims Branch (SCB). SCB then reviews and confirms the band's submission. After that research is completed, SCB usually meets with the band to go over the findings and, with the band's concurrence, the claim is then sent to the Department of Justice for legal review.
>
> When a claim is sent to the Department of Justice it is complete; that is, all of the necessary research has been done. This means that a complete treaty annuity paylist analysis has been completed to determine an "adjusted date of first survey (DOFS) population." This population includes absentees, late adherents to treaty, and landless transfers, as well as women of Indian descent marrying into the band. This is done for all treaty land entitlement claims. The Department of Justice then recommends to the Minister of Indian Affairs and Northern Development

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162 ICC Transcript, November 18, 1994, pp. 77-78 (Sean Kennedy).

whether the claim should be accepted or not. Negotiations can then begin if the claim is accepted.

When you requested that the federal government look into your treaty land entitlement claim, it was agreed to because the Department had done previous research on your claim in the mid-1970's and it was found that no claim existed using the principles of research in place at that time (no research was done concerning late adherents to treaty, landless transfers, women marrying into the band, and even absentees). Now that we do much more comprehensive research we have agreed to review your claim based on our current research principles.[163]

Clearly, validation of claims was still being undertaken on the basis of the broader criteria which had evolved since the late 1970s, or else it would not have been necessary to reopen the claim. The references to new validation principles in Mr. Gross's letter were not limited to absentees, but also included "late adherents to treaty, landless transfers, [and] women marrying into the band." In testimony before the Commission, Mr. Gallo described the evolution of the criteria in these terms:

Q. What about the research criteria employed by the Office of the Treaty Commissioner, was it, again, an evolution from say the '83 guidelines?

A. Yes. Yes, definitely. . . . For example, the first 15 Treaty Land Entitlement validations in Saskatchewan, all what happened was, is that people took the annuity pay list in the calendar year, flipped to the back page, looked at the bottom total paid, took that number, multiplied it by the per capita treaty provision, compared it with the land received and confirmed by order-in-council, did a comparison and if there was a shortfall then there was a Treaty Land Entitlement. There was absolutely no analysis, no looking for new

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163 A.J. Gross, Negotiator, Specific Claims West, to Chief Lionel Sparvier, Cowessess Band, July 23, 1991 (ICC Exhibit 10, pp. 1-2).

> adherents, no double counts, no anything. I mean that's how the first 15 got validated, and things are very, very different today.[164]

By January 20, 1992, with DIAND and the FSIN still some eight months from completing the two-year negotiation which culminated in the Saskatchewan Framework Agreement, Canada was still outwardly relying on the criteria in the 1983 Guidelines. But its position was at best ambiguously stated in a letter from Mr. Gross, by then Director of Treaty Land Entitlement, to Stewart Raby of the FSIN:

> We have received inquiries as to our approach for determining the eligible population of a band for treaty land entitlement purposes. *The federal policy paper dated May 1983, titled Office of Native Claims Historical Research Guidelines for TLE Claims, continues to be the foundation for developing prospective band claims to outstanding TLE.* In response to a band submission outlining the basis for a claim to additional land, the government assesses the claim in accordance with the guidelines and, as part of the process, meets with bands to exchange information uncovered from research activity carried out in accordance with the guidelines.
>
> After a band has indicated its acceptance of the conclusions of the research, the department then consults with the Department of Justice to determine if a lawful obligation exists for additional lands. If an obligation does exist, the next phase would normally include negotiations leading to settlement on a Date of First Survey shortfall.
>
> In the case of TLE claims in Saskatchewan the Treaty Commissioner's Office proposed an alternate means of determining the eligible population for the bands negotiating settlements with the government. This proposal was intended as part of the overall formula for determining compensation in that particular negotiation. When agreed to in negotiations, the formula will be applied only to those bands which first qualify for entitlement based on the 1983 policy. In other words, Saskatchewan treaty land entitlement claims are accepted for negotiation

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[164] ICC Transcript, May 25, 1995, pp. 266-67 (James Gallo).

> on the basis of research conducted pursuant to the 1983 guidelines.
>
> *The so-called "Adjusted Date of First Survey Population Count Proposed"* ["ADOFS"] *in Saskatchewan must be understood as part of the overall settlement approach. It does not affect the criteria for determining validation in the first instance.*
>
> This clarification is being provided to confirm that the government's policy on the acceptance of the TLE claims has not been changed.[165]

It is interesting to note that the Kawacatoose First Nation has relied on this letter in support of its position that the criteria for validation of treaty land entitlement claims had not changed from the 1983 ONC Guidelines which, in its view, contemplate later additions to a band's population. At the same time, counsel for Canada submit that this letter demonstrates that Canada was relying on its interpretation of lawful obligation as the basis for validation, and that the criteria in the Guidelines related more specifically to settlement once a band had established a lawful obligation based on DOFS shortfall.[166]

Three months later, on April 15, 1992, Kawacatoose submitted its claim based on the 1983 ONC Guidelines.

On September 22, 1992, Canada, Saskatchewan, the FSIN, and the 26 Entitlement Bands finally executed the Saskatchewan Framework Agreement, with the two governments also signing the companion Amended Cost Sharing Agreement. Although the witnesses before the Commission had very different interpretations of Article 17 and other provisions of the Framework Agreement and the Amended Cost

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165 A.J. Gross, Director, Treaty Land Entitlement to Stewart Raby, Federation of Saskatchewan Indian Nations, January 20, 1992 (ICC Documents, pp. 230-31). Emphasis added.

166 ICC Transcript, December 16, 1994, p. 66 (Rem Westland).

Sharing Agreement, they nevertheless concurred that these documents represent a major accomplishment in resolving treaty land entitlement questions in Saskatchewan, particularly in light of the number of parties involved and the quantity and complexity of the issues addressed.

As discussed previously in this report, the Framework Agreement emerged from the legal context of the lawsuit commenced in a representative capacity on behalf of the 26 bands whose claims had been accepted for negotiation, and from the political context of the Office of the Treaty Commissioner and its recommendations. Moreover, there were concurrent developments in the validation context as negotiations with the Nikaneet and Cowessess First Nations proceeded. With respect to Nikaneet, David Knoll testified:

> Nikaneet was a band whose entitlement claim had been accepted for negotiation. They anticipated that they could proceed independently of the Framework negotiations and conclude their agreement separate and apart much more rapidly than the Framework Agreement would be negotiated. As it turned out, I suppose there was some reluctance on the part of the Federal and Provincial Governments to conclude the Nikaneet Framework Agreement or Treaty Land Entitlement Agreement until the similar issues that were being dealt with in the Framework Agreement were addressed on a comprehensive basis. So what actually turned out was that Nikaneet and the Framework Agreement negotiations almost proceeded simultaneously and we were in contact with legal counsel for Nikaneet and they had their representatives present at the negotiations.
>
> So the Assembly of Entitlement Chiefs were aware of the Nikaneet Band out there that weren't really part of the Framework Agreement but they were in the process of negotiating their settlement on a similar basis as the Framework Agreement on many of the issues.[167]

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167 ICC Transcript, May 24, 1995, pp. 106-07 (David Knoll).

Mr. Knoll noted that, as negotiations proceeded on the Saskatchewan Framework Agreement, the negotiators for the FSIN and the Entitlement Bands became more aware of and concerned with how that agreement might also impact on Cowessess and other First Nations who might subsequently bring forward treaty land entitlement claims:

> The Cowessess Band had submitted a claim for Treaty Land Entitlement. Their claim had not been accepted yet but we were made aware that it was imminent and that Cowessess would be validated in very short order and we thought perhaps during the course of the negotiations they would have their claim accepted and they would then become the 27th entitlement band. As it turned out, they weren't validated or accepted for negotiation as an entitlement band during that two-year period but the chiefs were made aware of the concerns of Cowessess and they should be able to participate in whatever the benefits were derived from the Framework Agreement. . . .
>
> As well it was evident during the course of the negotiations and the application of the adjusted date of first survey criteria for determining the quantum, that if these criteria were applied consistently for existing entitlement bands – and these were the criteria that would be applied in a comprehensive way for the 26 bands – we looked at those criteria and it was brought to our attention by the technicians working with the F.S.I.N. that this may give rise to entitlement claims by other Indian bands who were not recognized as entitlement bands under the Framework Agreement process. So we were aware that there would be potentially five to seven other entitlement bands if the criteria for determining the population figures at the date of first survey were applied consistently.[168]

While the Framework Agreement represented a crowning achievement in the process of settling the claims of the Entitlement Bands, other Saskatchewan bands were not having the same success. In late 1992, the Ocean Man First Nation submitted a

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[168] ICC Transcript, May 24, 1995, pp. 107-08 (David Knoll).

claim based on its base paylist and subsequent additions to the Band's population.[169] The response from Juliet Balfour of Treaty Land Entitlement to the Chief and Council on November 5, 1993, was succinct:

> At this stage, without the benefit of a review by the Department of Justice, the research discloses no date of first survey shortfall, which we calculate as follows:
>
> Band Base Paylist (July 16, 1880) + Arrears/Absentees - Double Counts - Scrip = Date of First Survey Population.
>
> 167 + 16 - 0 - 0 = 183
>
> 183 x 128 acres = 23,424 acres Land Owed
> 185 x 128 acres = 23,680 acres Land Received
>
> ESTIMATED LAND SURPLUS = 256 ACRES
>
> By policy we do not accept treaty land entitlement claims if the land entitlement based on the date of first survey population has been received. Only if there is a shortfall in land based on the date of first survey population does the category of late adherents to treaty get consideration within the context of an entitlement negotiation.[170]

Upon receipt of this preliminary rejection of the Ocean Man claim on policy grounds, Stewart Raby of the FSIN wrote to the Department to request a copy of the policy. Mr. Gross replied:

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169 Stewart Raby, Federation of Saskatchewan Indian Nations, to Wilma Jackknife for Indian Claims Commission, June 12, 1994 (ICC Documents, p. 411).

170 Juliet Balfour, Treaty Land Entitlement, to Chief and Council, Ocean Man First Nation, November 5, 1993 (ICC Documents, pp. 395-96).

Further to your request of November 9, 1993, I write to clarify federal policy with regard to the acceptance of treaty land entitlement claims under the Specific Claims Policy.

As a first premise, our ability to accept and negotiate treaty land entitlement claims derives from the Specific Claims Policy as set out in the booklet "Outstanding Business" . . .

In treaty land entitlement claims, Canada's position is that our lawful obligation to a band is fulfilled when sufficient land under the per capita land provision of the treaty is provided to the band as of the date of first survey. This position is based on legal advice. All individuals who can be identified as members of a given band as of the date of first survey are eligible to be counted for purposes of land allotment. In researching these claims all tools available to us which can facilitate reconstruction of the band membership in that year are used. We rely not just on what the surveyor knew to be the band population, but on what the present day, best evidence shows to constitute that membership.

The categories we generally use to determine the date of first survey population include:

1) people on the paylist in the year of first survey or on the paylist to which the surveyor would have had access when carrying out the survey;
2) people paid treaty annuities after the date of first survey as absentees from the band membership at the date of first survey; and
3) people paid treaty annuity arrears after the date of first survey for that year.

In the absence of evidence to the contrary, individuals from these three categories collectively represent the population which we construe as constituting the date of first survey membership. Because this is an exercise which embraces the benefits of hindsight, we take into account those band members whom the surveyor cannot be expected to have known existed at the date of first survey, but who may in fact have existed. We also deduct from the number those who present day research shows were counted elsewhere for land (double counts) or those who took scrip, even though the surveyor may not have known this at the time.

> It is, therefore, this reconstructed population based on the best evidence available to the researchers which forms the membership on which our lawful obligation is based.
>
> In the course of researching the band's history we have, in the past, also identified individuals who have joined the band after the date of first survey up to the present day. The categories of persons to be identified in the research report are set out in the 1983 Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims. We will continue this research practice. If bands have claims based upon a date of first survey shortfall, depending on all the circumstances surrounding the claim, we may then take into account these other categories in negotiating settlements to these claims.
>
> We must be clear with claimant bands, however, that our lawful obligation extends only to the strict date of first survey population. That number is the threshold which claimant bands must reach before a treaty land entitlement claim will be accepted.
>
> Therefore, if a band does not establish a land shortfall based on the date of first survey population, it has no TLE claim. If however this shortfall exists, we are then able to consider the addition into the claim of those additional persons identified as having joined the band after the date of first survey. This is known as the adjusted date of first survey population which is only used to determine compensation, not claim validation.
>
> In light of the fact that bands are submitting TLE claims which do not disclose date of first survey land shortfalls, this clarification of our policy is needed.[171]

Mr. Gross subsequently confirmed on January 28, 1994 – the same date on which Jane-Anne Manson of DIAND advised counsel for Kawacatoose of the preliminary rejection of that First Nation's claim – that the Ocean Man claim did not disclose a DOFS shortfall. Accordingly, the claim was rejected on the basis of the principles set forth in

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171 A.J. Gross, Director, Treaty Land Entitlement, to Stewart Raby, Federation of Saskatchewan Indians, November 30, 1993 (ICC Documents, pp. 397-99).

the letters of November 5 and 30, 1993, and the Specific Claims Policy.[172] According to Mr. Kennedy, the policy set forth in Mr. Gross's letter of November 30, 1993, which limited the entitlement population to the DOFS population plus absentees and arrears, represented a departure from the 1983 ONC Guidelines.[173]

Canada's reliance on the DOFS population as the threshold for treaty land entitlement claims was reiterated in a letter dated October 25, 1994, from Mr. Gross to Chief James O'Watch of the Carry the Kettle First Nation, which had a "true" date-of-first-survey shortfall (based on the DOFS population plus absentees and arrears only) and not merely an adjusted-date-of-first-survey (ADOFS) shortfall (based on new adherents to treaty, landless transfers, and women of Indian descent marrying into the band, in addition to the DOFS population, absentees, and arrears).[174] Mr. Gross indicated that Canada was prepared to accept the First Nation's claim for negotiation on the basis of certain fixed DOFS and ADOFS populations, and in a fashion consistent with the principles of the Saskatchewan Framework Agreement and the Amended Cost Sharing Agreement. If Carry the Kettle was not prepared to accept the fixed DOFS and ADOFS populations, it was entitled to consider requesting an inquiry before the Indian Claims Commission. With regard to Canada's lawful obligation, Mr. Gross stated:

> [T]he extent of Canada's lawful obligation with respect to treaty land entitlement is limited to the DOFS population only. Notwithstanding this, in keeping with the Saskatchewan Framework Agreement, we are

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172 A.J. Gross, Director, Treaty Land Entitlement, to Chief Laura Big Eagle, Ocean Man Band, January 28, 1994 (ICC Documents, p. 402).

173 ICC Transcript, November 18, 1994, pp. 98-99 (Sean Kennedy).

174 ICC Transcript, December 16, 1994, p. 161 (Rem Westland).

> prepared to enter negotiations based on the ADOFS population but this is not our legal obligation.[175]

CURRENT PROCESS OF VALIDATION

Rem Westland, Director General of DIAND's Specific Claims Branch, testified in great detail before the Commission with respect to Canada's present philosophy and practices in accepting bands' claims for negotiation. He also corresponded directly with Co-Chairs Prentice and Bellegarde of the Indian Claims Commission to clarify Canada's position in relation to its lawful obligation to fulfil treaty land entitlement. It is worth setting out the terms of that letter at some length since it elaborates on the basis for Canada's current stance:

> I want to restate what the understanding and approach of the Specific Claims Branch is to treaty land entitlement (TLE) review, negotiation, and settlement. I will do this with an eye to what the Commission is hearing in the various TLE related claims coming to the Commissioners for consideration.
>
> I want to begin by noting that one of the purposes of the Specific Claims Policy was to respond to historical grievances which upset the relationship between Canada and the First Nations of this country. TLE claims relate, for the most part, to allegations of inadequate fulfilment of certain land provisions of treaties as far back as the late 1800s.
>
> In short, this branch researches TLE claims to determine whether there was a land shortfall owing to a First Nation at the time that its reserve under treaty was first created (the Date of First Survey, or DOFS). If there was a shortfall, based on the people who were members at that time we recommend the acceptance of the claim.
>
> Over the many years that TLE claims have been reviewed by this branch, we have learned that numerous other considerations can

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[175] A.J. Gross, Director, Treaty Land Entitlement, to Chief O'Watch and Council, Carry the Kettle First Nation, October 25, 1994 (ICC Exhibit 11, pp. 1-2).

potentially figure in the ultimate settlement of a TLE claim, such as the categories of individuals labelled "landless transfers," "late adherents," and so on. Over the last 20 years or so we have developed research methodologies to get a fix on those other numbers, and indeed have used those numbers to settle some claims that would not meet the acceptance criteria we rely on today, the DOFS population.

But at no time, since 1982 and before, has the general rule under the policy changed. A claim can be accepted for negotiation by Canada only if there is a lawful obligation established pursuant to the Specific Claims Policy. The assessment of this is the responsibility of the Department of Justice (DOJ). This is just as true for TLE claims as it is for all other types of specific claims. Whereas there will be examples where the general rule has been extended to accommodate particular circumstances and times, it is part of my set of responsibilities as Director General of the branch to insist upon the fundamentals of the policy if changing times require this.

With regard to the fundamentals regarding TLE claims, one of the fundamentals is that the collective right to treaty land was intended as a general rule to be filled at the DOFS. If a First Nation did not receive its full treaty entitlement to land at that time there might remain a continuing outstanding collective right to land under the relevant provision of the treaty.

It is no secret that federal and provincial governments are challenged by a difficult deficit situation. It is also no secret that TLE settlements are very costly and that the number of claims are [sic] already well over twice the number of claims foreseen even as recently as 1982. Indeed, there are still a significant number of "historical" TLE claims before the government which have only come to anyone's attention within the last few years, and more are being researched every day. To insist upon the fundamentals with regard to TLE claims is a reasonable position to take. However, we do not use cost as a criterion to accept or reject a TLE claim. The principal [sic] we use is legal obligation based on DOFS population.

If there is an agreed outstanding collective right to land it becomes the burden of this branch to develop, in negotiations with First Nation(s), an agreed settlement of the claim to more land. As a general rule First Nations take the position that, since the collective right is still outstanding

today, the claim must be settled by using current population figures. Canada's position is that the historical shortfall amount is all that is owed. The outcome of successful negotiations is to achieve a settlement which is reasonably in the range between these two positions.

Data such as "landless transfers," "late adherents," and so on are really just variables which help to guide negotiations to a settlement amount somewhere between the DOFS shortfall and the current population quantum. In some settlement models, such as the Saskatchewan Framework of 1992 these data figure prominently. In other settlements, such as some of the early Alberta settlements these data are largely irrelevant.

What has happened to some extent is that some folk, understandably perhaps, have come to equate those variables with lawful obligation. I was candid in my meetings with you and the Commission that this includes some federal officials over the years.

Indeed, some participants in the TLE process equate settlement outcomes in any one case with a lawful obligation applicable to themselves. As I said at out meeting the record will show that virtually every TLE settlement differs one from the other. Some are closer to the current population end of the settlement range in terms of value. Others are closer to the middle of the range. Even in Saskatchewan, where one settlement model was used for over 20 First Nations the real benefit, in terms of acquiring the treaty land shortfall and having financial resources left over, is greater for the First Nations in the northern part of the province that in the south. The reason for this is that the formula uses an average land value and southern land is far more expensive then [sic] northern land.

Interestingly, as I said, there are now some folk who believe that because average land values were used in the Saskatchewan Framework Agreement, or because tax loss compensation was paid at 22.5 times previous year's tax loss, those provisions (and others) must now be considered imperative inclusions in all future settlements. Again, this is to mistake a settlement approach with an assessment of lawful obligation.

My point at our meeting, and my point here, is that the fundamentals of the policy have not changed. Settlement approaches varied considerably over the years, and on occasion those settlement approaches have been confused with the assessment of lawful obligation.

> On any one claim, at any one time, DOJ can reply to your questions about Canada's assessment of lawful obligation.
>
> My purpose here is to assure you that Canada has never done less than settle accepted TLE claims fairly, and has actually done far better than that. I view the relatively few First Nations which benefitted from TLE acceptance on a basis broader than Canada's lawful obligation as exceptions to the rule. A previous minister of this department said very clearly to some First Nations that exceptions to the rule do not create new lawful obligations. In this same way, a settlement with one First Nation does not establish a "marker" which becomes an obligation upon Canada to now offer nothing less and nothing different in any other set of negotiations.[176]

In his testimony before the Commission, Mr. Westland stated that the policy managed by DIAND is Specific Claims Policy rather than treaty land entitlement policy, with his task being to ensure the fair application of Specific Claims Policy to treaty land entitlement matters. Under that policy, it is the role of the Department of Justice to determine whether a lawful obligation exists.[177] If the Department of Justice concludes that a lawful obligation does exist, the Minister of Indian Affairs and Northern Development has the discretion whether to proceed with the negotiation of a particular claim; where no lawful obligation is found to exist, the Minister does not have any discretion and cannot accept the claim for negotiation.[178] In particular, a case

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176 Rem Westland, Director General, Specific Claims Branch, to Jim Prentice and Dan Bellegarde, Co-Chairs, Indian Specific Claims Commission, November 30, 1994 (ICC Exhibit 8, pp. 1-3).

177 ICC Transcript, December 16, 1994, pp. 8-9 (Rem Westland).

178 ICC Transcript, December 16, 1994, pp. 8-9, 162 (Rem Westland).

involving a "met" collective right cannot be reopened since the lawful obligation has already been satisfied.[179]

While raising an objection during Mr. Westland's cross-examination, counsel for Canada acknowledged that the review of lawful obligation by the Department of Justice includes deciding "whether there is a lawful obligation, that is whether there is an obligation to treat all bands the same, [and] whether a practice that occurred in the past, there is a lawful obligation to continue it."[180] While the Department of Justice does not advise DIAND on matters of morality or fair play, counsel conceded that equitable considerations are factors in the determination of Canada's lawful obligation.[181] According to Mr. Westland, if, upon review, the different treatment of one band constitutes on grounds of equity a lawful obligation, then the matter may fall back within the jurisdiction of Specific Claims.[182] However, where a claim does not fit within the jurisdiction of the Specific Claims Branch or involves equitable considerations, it might be referred to and dealt with by another branch of government such as Special Claims.[183] Only if these equitable considerations are compelling will DIAND proceed to negotiations, but this decision is beyond Mr. Westland's purview.[184]

According to Mr. Westland, Canada's lawful obligation for the purpose of treaty land entitlement requires it to assess a band's population as of the date of first survey

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179 ICC Transcript, December 16, 1994, pp. 186-88 (Rem Westland).

180 ICC Transcript, December 16, 1994, p. 39 (Bruce Becker).

181 ICC Transcript, December 16, 1994, pp. 40-41 (Bruce Becker).

182 ICC Transcript, December 16, 1994, p. 42 (Rem Westland).

183 ICC Transcript, December 16, 1994, pp. 28-29, 31 (Rem Westland).

184 ICC Transcript, December 16, 1994, pp. 43-44, 46 (Rem Westland).

of the reserve, and to count only those Indians who were alive and members of the band at that time. The quantum of land to which the band is entitled is based on this DOFS population.[185] If the band received a DOFS surplus of land, it will not be entitled to another survey;[186] only when DIAND discovers people who were entitled to be counted at the time of first survey but were missed are multiple surveys possible.[187] Mr. Westland admitted that the difference of one person over or under the DOFS threshold can make a large difference in terms of land and money: a band with a date-of-first-survey shortfall can negotiate a settlement based on its ADOFS population (including new adherents, landless transfers, and women of Indian descent marrying into the band), whereas a band with no DOFS shortfall but similar numbers of late additions has no right to negotiate at all.[188]

The reason for excluding claims based solely on late additions is that First Nations with no sense of being historically wronged were submitting "research-driven" claims originating in the late 1980s, with the result that the number of claims in Saskatchewan quickly escalated. Since Specific Claims Policy was intended to address historical grievances and not simply to provide "an alternative way to get discretionary funds for economic development . . . [or] to acquire additions to reserves," DIAND considered it necessary to return to the "fundamentals" of Specific Claims Policy based on date-of-first-survey shortfall.[189]

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185 ICC Transcript, December 16, 1994, pp. 24-25 (Rem Westland).

186 ICC Transcript, December 16, 1994, p. 20 (Rem Westland).

187 ICC Transcript, December 16, 1994, pp. 21-22 (Rem Westland).

188 ICC Transcript, December 16, 1994, pp. 134-35 (Rem Westland).

189 ICC Transcript, December 16, 1994, pp. 98-99 (Rem Westland).

This return to fundamentals meant that only those Indians who were members of a band at its date of first survey were entitled to be included in an entitlement calculation.[190] In making that count, officials at DIAND "bend over backwards" to "reconstruct who really was there."[191] In the spirit of the treaty and in recognition of the difficult circumstances and nomadic way of life of the Indians at the time of survey, Canada has, once the DOFS threshold has been surpassed, entered into settlements that range, in Mr. Westland's opinion, far beyond what it views as its lawful obligation.[192]

Mr. Westland acknowledged that the manner in which DIAND implements the Specific Claims Policy is "always changing," and that landless transfers and other late additions were treated differently five to ten years ago than they are today.[193] He viewed the "relatively few First Nations which benefitted from TLE acceptance on a basis broader than Canada's lawful obligation as exceptions to the rule." These exceptions resulted from "misinterpretation of how the policy works by the federal officials who administer it" or "guidelines which are seriously flawed and way out of date."[194] He also conceded that the government's perception of policy can change as its legal advisers change and as the amount of money at stake increases and attracts greater attention:

> But certainly it happens that legal advisers on files along the way have had changing views on how these things should be done. And

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190 ICC Transcript, December 16, 1994, p. 85 (Rem Westland).

191 ICC Transcript, December 16, 1994, pp. 88, 116-17 (Rem Westland).

192 ICC Transcript, December 16, 1994, p. 117 (Rem Westland).

193 ICC Transcript, December 16, 1994, pp. 26-27 (Rem Westland).

194 ICC Transcript, December 16, 1994, p. 168 (Rem Westland).

> recommendations have gone up, have been properly put forward on the basis of recommendations. But when you talk to Department of Justice, it's like every department in government: it's quite big. And at a certain point, when a transaction is fairly big, the attention of government is just a little different that it might have been.[195]

In these circumstances, Mr. Westland admitted that, had Kawacatoose brought forward its claim prior to 1983, it likely would have had its claim accepted for negotiation and settled under the terms of the Saskatchewan Framework Agreement by now.[196] However, he also stated that the "exceptions to the rule" which were validated by his predecessors would not be accepted for negotiation were they to be reviewed by him today.[197]

Nevertheless, Mr. Westland considered DIAND's position to be that "the difference in treatment that comes through different implementation approaches over the years has not created a lawful obligation."[198] He agreed that the three categories of people set forth in Mr. Gross's letter of November 30, 1993 – the base paylist population plus absentees and arrears – collectively represent the population constituting the date-of-first-survey membership,[199] and that, if a band has received its full treaty land entitlement entitlement at DOFS, no land will be set aside for late additions to the band's population.[200] Upon counsel for Kawacatoose challenging Mr.

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195 ICC Transcript, December 16, 1994, p. 106 (Rem Westland).

196 ICC Transcript, December 16, 1994, p. 149 (Rem Westland).

197 ICC Transcript, December 16, 1994, p. 169 (Rem Westland).

198 ICC Transcript, December 16, 1994, p. 42 (Rem Westland).

199 ICC Transcript, December 16, 1994, p. 89 (Rem Westland).

200 ICC Transcript, December 16, 1994, p. 93 (Rem Westland).

Westland on his testimony that DIAND takes a "generous approach" to the three categories and considers other "realities" and "factors,"[201] counsel for Canada acknowledged:

> I think that what Mr. Westland is getting at is that we don't close our minds to other factors, but these [three categories] obviously are the one[s] that have proven reliable on a day-to-day, year-to-year basis in terms of [giving] one an indication of who was reasonably a member of the band.[202]

Mr. Westland viewed the "flawed" 1983 ONC Guidelines as still useful in terms of the criteria to be researched and considered in *settling* claims,[203] but that validation is assessed not on the guidelines but on the basis of lawful obligation.[204]

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201 ICC Transcript, December 16, 1994, pp. 151-52 (Rem Westland).

202 ICC Transcript, December 16, 1994, p. 154 (Bruce Becker).

203 ICC Transcript, December 16, 1994, p. 80 (Rem Westland).

204 ICC Transcript, December 16, 1994, p. 61 (Rem Westland).

PART IV

ANALYSIS

ISSUE 1: KAWACATOOSE'S DATE-OF-FIRST-SURVEY POPULATION

Are the two families who appear on the 1876 treaty paylist for Fort Walsh (Paahoska/Long Hair and Wui Chas te too tabe/Man That Runs) members of the Kawacatoose (Poor Man Band) First Nation or the Lean Man (Poor Man) First Nation?

Late in the inquiry, Canada tendered additional evidence to suggest that the Angelique Contourier family, which in 1883 was paid arrears for 1876 with Kawacatoose, should also be excluded from the count for the First Nation's DOFS population. According to counsel for Canada, this family appeared on the base paylist – the 1875 paylist – for the George Gordon Band; the survey for that band, although completed in 1876, was begun in 1875 following the Band's receipt of its treaty annuity payments. Based on the "first in time, first in right" principle, counsel for Canada contended that the five members of the Contourier family should be counted with the George Gordon Band and not with Kawacatoose, thereby reducing the Kawacatoose DOFS population, in Canada's view, to 197 from 202.[205]

Like the issue dealing with the two Fort Walsh families, the questions relating to the Contourier family require the Commission to make a determination of Kawacatoose's population to establish whether, in the first instance, the First Nation has any outstanding treaty land entitlement, and, if so, the residual acreage owed by

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[205] Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25); Submissions on Behalf of the Government of Canada, October 16, 1995, p. 6.

Canada to the First Nation. If the date-of-first-survey threshold approach, which Canada submits is its lawful obligation, is applied and the Contourier family or either of the Fort Walsh families is excluded, Kawacatoose's DOFS population would drop from the figure of 215 put forward by the First Nation to a level below the threshold of 212 for whom land was provided in the First Nation's 1876 survey. For this reason, this part of the report will address both of these factual questions together.

The Fort Walsh Families

Canada's primary position is that the evidence discloses that the families of Paahoska (Long Hair) and Wui Chas te too tabe (Man That Runs) were members of the Assiniboine Poor Man or Lean Man Band when they were paid treaty annuities at Fort Walsh in 1876. In the alternative, Canada argues that, because the evidence regarding membership of the two families is at best evenly balanced and not decisive one way or another, and since the onus lies with Kawacatoose to establish on a balance of probabilities that the Fort Walsh families were members of that First Nation, then Kawacatoose has failed to prove its case. Conversely, the First Nation contends that the two families belonged to its membership, and claims that it had accepted and met the onus of proving that point.

With regard to Canada's position that the two families could be shown to belong to the Assiniboine Poor Man Band, counsel for Canada noted that the Kawacatoose First Nation is predominantly Cree in origin, whereas the names of the two families were written in Assiniboine. In making this submission, counsel referred to the comments of Indian Agent Angus McKay, who referred to Kawacatoose as a chief having "a band of 39 families all of the Cree tribe who have always made their living

by hunting and trapping."[206] Since the names of Long Hair and Man That Runs were listed in Assiniboine, whereas the names of other families at Fort Walsh in 1876 were recorded in Cree, this, Canada contends, is "powerful evidence" that the two families were of Assiniboine descent and were therefore more likely members of the Assiniboine Poor Man Band.[207] Moreover, the 1876 paylist for Kawacatoose specifically refers to "Pierre Peltier (Assiniboine)," highlighting the "novelty" of Assiniboine membership in the band at that time.[208] Counsel also emphasized the manner in which the 1876 paylist from Fort Walsh groups Poor Man on the same page with the Assiniboine Little Mountain Band, and the fact that the Assiniboine Poor Man and Grizzly Bear's Head (formerly Little Chief) Bands ultimately "ended up today on the same reserve (along with Mosquito)."[209]

In the closing oral submissions, counsel for Canada acknowledged that, had the names of Long Hair and Man That Runs been recorded in the Cree tongue, those families would likely have been accepted and counted by Canada as members of Kawacatoose. Counsel referred to Canada's policy of requiring an individual or a family to appear on more than one paylist for a First Nation before that individual or family is accepted by Canada as a member of that First Nation, but added that Canada has made an exception to this policy where the sole paylist on which the individual or family appears is the base paylist. The two families were recorded at Fort Walsh in

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206 Angus McKay, Indian Agent, Winnipeg, to Superintendent General of Indian Affairs, October 14, 1879 (ICC Documents, p. 102).

207 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 11.

208 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 11.

209 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 11.

1876, which is the base paylist year for Kawacatoose, and never again appear on a paylist for any band. Nevertheless, it is Canada's position that, given that the base paylist is arguably divided and that the connection between Kawacatoose and the two families is tenuous, Canada is not willing to extend the benefit of the doubt, as it might have done had the two families made their only appearance on the reserve's paylist for 1876 rather than at Fort Walsh.[210]

Counsel for the First Nation countered that, although the names of the two families were listed in Assiniboine, that fact does not necessarily imply that the two families were of Assiniboine ancestry. The language used in the Fort Walsh paylist may have had more to do with the individual who was translating for Major Walsh than the nationality of the two families. Noting that it was not uncommon to find Cree bands with Assiniboine members and Assiniboine bands with Cree members, counsel submitted that, even if the two families were Assiniboine, that alone would not prove that they were not members of Kawacatoose, since Kawacatoose himself and other members of the band were Assiniboine.[211]

With regard to Canada's concerns regarding the divided paylist in 1876, counsel for the First Nation emphasized that Kawacatoose members were also paid at Fort Walsh in 1879.[212] Counsel contended that, once the two Fort Walsh families had received annuities in 1876 as members of Kawacatoose, then, under Canada's policy,

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210 ICC Transcript, October 24, 1995, p. 149 (Ian Gray).

211 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 19-20.

212 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 19, referring to Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics," November 1994 (ICC Exhibit 2, vol. 1, tab A-2, p. 2), and to ICC Transcript, November 15, 1994, pp. 113-14 (Jayme Benson).

the First Nation was entitled to count them in its DOFS population notwithstanding the fact that 1876 represented their only appearance on any paylist.

Counsel for Kawacatoose also noted that, with the exception of the Little Mountain Band (and depending on whether Long Hair and Man That Runs were members of Kawacatoose or the Assiniboine Poor Man Band), all the bands paid at Fort Walsh in 1876 had already adhered to treaty. Major Walsh used the checks marked "W," "V," and "X" to denote new adherents to treaty, which Peggy Brizinski of the OTC interpreted to mean new adherents to "existing bands" – that is, bands which had already adhered to treaty.[213] Because the names of the two families were designated with the letter "V" on the Fort Walsh paylist for 1876, counsel submitted that the two families must have been members of a band that had already adhered to treaty by 1876. As Kawacatoose adhered to Treaty 4 in 1874, but the Assiniboine Poor Man did not adhere until 1877, this meant that the reference to "Poor Man" in the 1876 paylist at Fort Walsh must have related to Kawacatoose.[214]

In addition, noting the question raised by Ms. Brizinski of the OTC in her letter of November 1, 1993, counsel for Kawacatoose submitted that Major Walsh, who was careful to establish eligibility before paying annuities, would not have been likely to pay two families in 1876 in the absence of the Chief and without paying the remainder of the band when, first, the status of the band as British or American had not been determined and, second, the Chief had not yet been elected and recognized as Chief by the Department of Indian Affairs.[215] According to counsel, the Assiniboine Poor Man

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213 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 13-14.

214 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 15.

215 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 18.

was not recognized as a band until 1877, when the Chief was elected in accordance with the terms of the *Indian Act*. Conversely, the members of Little Mountain, who were all designated with an "X" on the Fort Walsh paylist and clearly had not adhered to treaty, may have constituted an exception if Major Walsh knew or was convinced that the Band was British.[216]

Counsel for Canada pointed to the payment of Little Mountain Band members as evidence that adherence to treaty was not a prerequisite to receiving annuities. Rather, "it appears the prerequisite for getting paid was being British Indians (which Poor Man Assiniboine was), not that the individual be a member of a Band that had already adhered."[217] The wording of the 1877 adhesion to treaty further demonstrated that Indians just then adhering to treaty had nevertheless already received annuity payments:

> And we hereby agree to accept the several provisions and the payment in the following manner, viz.: That those who have not already received payment receive this year the sums of twelve dollars for the year 1876, which shall be considered their first year of payment, and five dollars for the year 1877, making together the sum of seventeen dollars apiece to those who have never been paid, and five dollars per annum for every subsequent year. . . .[218]

Counsel further argued that the Assiniboine Poor Man was the Chief of his band regardless of whether he was recognized as such by Canada. In the absence of evidence

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216 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 16.

217 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 10.

218 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 10-11; *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 13 (ICC Exhibit 28).

indicating that Major Waish was speaking on some basis other than his personal knowledge, counsel noted that Major Walsh in 1877 recounted the Assiniboine Poor Man's actions as a Chief in 1875 when, like Long Lodge and Little Mountain, Poor Man had refused to go to Fort Belknap in the United States to receive annuities from the Americans.[219] Counsel stated that, although this showed that Major Walsh knew by 1876 that the Assiniboine Poor Man was a Chief, the evidence also illustrated that members of other bands had been paid in the absence of their Chiefs.[220]

The First Nation also relied on the evidence of its own elders and those of the Mosquito/Grizzly Bear's Head/Lean Man First Nation to support its position regarding the two Fort Walsh families. That evidence can be summarized as follows:

- Long Hair and Man That Runs were brothers or at least related in some way.
- Long Hair and Man That Runs were both excellent runners and regularly travelled great distances together.
- The two families at one time lived on the Kawacatoose Reserve and both Long Hair and Man That Runs are buried on the Kawacatoose Reserve.
- Man That Runs was the grandfather of Paul Acoose, who formerly lived on the Kawacatoose Reserve but had married a woman from the Sakimay Reserve and moved there.
- There are relatives of the two families among current members of the First Nation.

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219 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 9; J.M. Walsh, Inspector, North-West Mounted Police, to E.A. Meredith, Deputy Minister of the Interior, October 28, 1877, NA, RG 10, vol. 3649, file 8280 (ICC Documents, p. 121).

220 ICC Transcript, October 24, 1995, p. 147 (Ian Gray).

- None of the Mosquito/Grizzly Bear's Head/Lean Man elders could recall ever hearing about Long Hair. They were, however, familiar with Man That Runs and his talent for running, but he was not known to have ever been a member of that First Nation or to have descendants among its members.

- Chief Kawacatoose himself was Assiniboine.

Counsel for the First Nation added that a review of the historical paylists for the Sakimay Reserve corroborates the evidence with regard to Paul Acoose.[221] Moreover, because the two brothers travelled together so extensively and for such great distances, counsel contended that it was likely that they had stopped in Fort Walsh in 1876 to receive their annuities.[222]

Counsel for Canada contended that the evidence of elder Irene Spyglass of the Mosquito/Grizzly Bear's Head/Lean Man First Nation was to be preferred over that of the other elders. She was reported to have stated that her grandfather on her mother's side was a brother of Man That Runs, and in counsel's view this established a closer family link with the Mosquito/Grizzly Bear's Head/Lean Man First Nation than with Kawacatoose.[223] It must also be recalled, however, that Irene Spyglass also gave a "clear indication that this individual, Man That Runs, was never a Mosquito Band member and she [did] not recall ever hearing of this individual as a Mosquito Band member."[224]

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221 ICC Transcript, October 24, 1995, p. 26 (Stephen Pillipow).

222 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 21.

223 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 17-18.

224 Clifford Spyglass, Land Manager, Mosquito Band, to Howard McMaster, Executive Director, Office of the Treaty Commissioner for Saskatchewan, May 1, 1995 (ICC Exhibit 24).

Counsel for Canada conceded that the elders' evidence, taken as a whole, generally supported the First Nation's position regarding the two Fort Walsh families, and further granted that such evidence was properly admitted under Specific Claims Policy which does not bind this Commission to strict rules of evidence. Nevertheless, Canada sought to refute the evidence on technical legal grounds.

Despite acknowledging that bands may be at a disadvantage because the historical documentary evidence has typically been prepared by agents of the federal government, counsel submitted that the courts and this Commission cannot simply allow such evidence to be admitted without considering the weight to be attached to it. Counsel referred to the reasons of McEachern CJBC at trial in *Delgamuukw v. British Columbia*:

> When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. For example, I do not accept the proposition that these peoples have been present on this land from the beginning of time. Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of the evidence in accordance with legal, not cultural principles.
>
> I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they were untruthful, but rather because I have a different view of what is fact and what is belief.[225]

Counsel further referred to the Court's comments regarding genealogical evidence:

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225 *Delgamuukw v. British Columbia*, [1991] 5 CNLR 1 at 41 (BCSC).

> There are obvious difficulties with this evidence, which, even when confirmed by witnesses, is in one sense just a collection of hearsay statements organized by Ms. Harris to demonstrate matrilinear organization of Houses. No verification of her conclusions is possible because there are no records. Even headstones do not disclose House membership. The reputation upon which she relies, if any, is limited to the Gitskan community which has an obvious interest in the outcome of the case for which these charts were prepared. Also, the genealogical charts furnish very little evidence about Gitskan populations or organization beyond the late years of the last century. In addition, it is generally held to be difficult, even with records, to have much understanding beyond three generations.[226]

Counsel further relied on the recent unreported judgment in *Twinn v. The Queen*, in which Muldoon J held:

> Until the Treaty of Wetaskiwin, long after the assertion of British (and latterly Canadian) sovereignty when the Cree, Blackfoot and Sarcees ended hostilities, this evidence discloses on a balance of probabilities that, aside from myth, no one knew why there were hostilities; and without any means of keeping a written record the probabilities lead to the conclusion that myth or oral history would not yield any objectively reliable reason or knowledge of the beginning of hostilities. That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that *their* ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.
>
> In no time at all historical stories, if ever accurate, soon become mortally skewed propaganda, without objective verity. Since the above mentioned pejorative characteristics, and more, are alas common to humanity they must have been verily evinced by everybody's ancestors, as they are by the present day descendants, but no one, including oral historians wants to admit that. Each tribe or ethnicity in the whole human species raises its young to believe that they are "better" than everyone else. Hence, the wars which have blighted human history. So ancestor

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226 *Delgamuukw v. British Columbia*, [1991] 5 CNLR 1 at 58 (BCSC).

> advocacy or ancestor worship is one of the most counter-productive, racist, hateful and backward-looking of all human characteristics, or religion, or what passes for thought. People are of course free to indulge in it – perhaps it is an aspect of human nature – but it is that aspect which renders oral history highly unreliable.[227]

On the basis of these authorities, counsel for Canada set forth a number of propositions on which it submits that the weight to be given to oral history should be assessed:

> Firstly, elders' statements should be considered by the Commission without concerns about admissibility but the relative weight such statements should be given does need to be taken into account. We would submit that such testimony should be treated very carefully where it is not corroborated in the written record.
>
> Secondly, if the statements are made by elders who are band members where such band is party to the claim, the weight given the evidence should be weighted accordingly.
>
> Thirdly, the timeframe [which] the evidence is describing is also important. If the evidence goes to events which occurred over 100 years, or three generations ago, the weight given the evidence should be discounted accordingly.
>
> Fourthly, the evidence should generally be internally consistent, though minor inconsistencies, particularly in voluminous evidence, may perhaps be ignored.

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227 *Twinn v. The Queen* (July 6, 1995), (FCTD) [unreported] at 82-83.

> Fifthly, testimony that can be called mythology (i.e. records impossible or improbable occurrences as fact) should be rejected and may in fact call into doubt the rest of the evidence given.[228]

Counsel for Canada invited the Commission to conclude that the evidence of the elders should be accorded little weight since the events of 1876 are almost 120 years in the past and have taken on a "sense of mythology," each of which factors undermines the credibility of that evidence. Counsel added that, "without questioning the *bona fides* of the elders," Kawacatoose stands to benefit from a settlement "in the millions of dollars" should the First Nation's position prevail.[229]

Finally, and as an alternative to Canada's position that the evidence discloses that the two Fort Walsh families were members of the Assiniboine Poor Man Band, counsel for Canada contended that the evidence before the Commission is evenly balanced and does not definitively prove that the two families belonged to either Kawacatoose or the Assiniboine Poor Man. If the Commission simply cannot decide on the First Nation to which the two families belonged, then the Commission should decide in Canada's favour. The foundation of this argument is that the onus of proving the membership of the two families rests with the First Nation, as can be seen in the reasons of Jessup JA of the Ontario Court of Appeal in *Saillant v. Smith*;

> If one does not have regard to the principle of *res ipsa loquitur*, in my view, there is not a preponderance of probability as to what caused the accident in question. There are two competing suggestions as to the cause; one, that the saddle was not adequately secured and secondly, it turned on the body of the horse for the reason suggested by the

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228 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 15.

229 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 15-16.

> defendant's son, as I have referred to. As between these two competing theories, in my view, the evidence is at best evenly balanced and, accordingly, the plaintiff has not proved his case.[230]

Counsel continued that, if the evidence of the Mosquito/Grizzly Bear's Head/Lean Man elders disqualifies the two families from membership in the Assiniboine Poor Man Band, it equally disqualifies them from Kawacatoose: they were not on any paylists after 1876, there are no direct descendants living on the reserve, and there is no evidence to confirm that they resided or settled on the reserve.[231] This statement by counsel ignores elder Alec Kay's statement that Long Hair and Man That Runs have relatives in the Kawacatoose First Nation, although, in fairness to counsel, the Commissioners recognize that Mr. Kay's evidence did not include the names of any such relatives. However, counsel's submission also overlooks the testimony of elder Pat Machiskinic which identified former Kawacatoose member Paul Acoose as the grandson of Man That Runs.

In response to these submissions by Canada, counsel for Kawacatoose agreed that the First Nation bears the burden of proof with regard to the membership status of the two Fort Walsh families. However, counsel submitted that the oral histories imparted by the elders should not be dismissed as lightly as counsel for Canada suggests, and that indeed a less stringent standard of proof must be employed in cases lacking a written history. In adopting this position, the First Nation relied on the reasons of former Chief Justice Dickson of the Supreme Court of Canada in *Simon v. R.*:

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230 *Saillant v. Smith* (1973), 33 DLR (3d) 61 at 63:

231 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 17-18.

> This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the treaty. True, this evidence is not conclusive proof that the appellant is a *direct* descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this treaty.[232]

Counsel for Kawacatoose also referred the Commission to the reasons in dissent on the appeal from the decision of McEachern CJBC in *Delgamuukw*, in which Lambert JA, after setting forth the foregoing passage from *Simon*, stated:

> It is important to examine evidence given orally, where the memory of the community is an oral memory, in the context of the fact that other forms of evidence are unlikely to be available. The oral evidence should be weighed, like all evidence, against the weight of countervailing evidence and not against an absolute standard, so long as it is enough to support an air of reality.[233]

Having considered and weighed all the foregoing documentary and oral evidence, this Commission has concluded that the families of Long Hair and Man That Runs were in fact members of Kawacatoose and not the Assiniboine Poor Man Band when they were paid at Fort Walsh in 1876. Although we must confess that, in our view and in the view of the research panel from the OTC, the documentary evidence

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232 *Simon v. R.*, [1986] 1 CNLR 153 at 171-72.

233 *Delgamuukw v. British Columbia*, [1991] 5 CNLR 1 at 213 (BCSC).

before this inquiry is at best inconclusive and contradictory. It must also be noted that there is nothing in that evidence which clearly contradicts the First Nation's contention that the two families belonged to it. The documentary evidence is primarily circumstantial in nature and does not resolve the issue at hand.

At the same time, as counsel for Canada has admitted, the evidence of the Kawacatoose and Mosquito/Grizzly Bear's Head/Lean Man elders has demonstrated more than the simple fact that the two families did not belong to the Assiniboine Poor Man. That evidence has also demonstrated that Long Hair and Man That Runs held a place of honour, which was in fact immortalized in song, in the oral history of Kawacatoose. There is no countervailing evidence in the face of this oral history.

Moreover, the position taken by the First Nation is more tangible than a mere "air of reality." The membership of these two families is an "either/or" proposition. Their names appear on the 1876 Fort Walsh paylist under the heading "Poor Man," and in this context it must be considered that they were definitely members of one of the two bands commonly referred to as Poor Man at that time. There is no basis for speculation that these families did not belong to either of these bands. It is in light of this fact and the evidence of the elders that we have reached our conclusion that the families were members of Kawacatoose. We find comfort in reaching this conclusion in the reasons of O'Halloran JA of the British Columbia Court of Appeal in *R.* v. *Findlay*:

> In a civil action, the plaintiff is said to have made out a *prima facie* case when he has adduced evidence which is capable of showing a greater probability that what he alleges is more correct than the contrary. . . . In a civil case, one side may win a decision by the narrowest of margins upon reasons which seem preponderating, although they are not in

> themselves decisive. The Court's decision may rest on the balance of probabilities. . . .[234]

In the result, we have determined, on a balance of probabilities, that the two families paid at Fort Walsh in 1876 under the heading "Poor Man" were members of Kawacatoose, and not the Assiniboine Poor Man Band. We therefore recommend that these two families should be included in determining the DOFS population for the Kawacatoose First Nation.

Angelique Contourier Family

The matter of the Angelique Contourier family first arose in this inquiry when counsel for Kawacatoose was advised in writing by Jane-Anne Manson of Specific Claims West on April 21, 1995, that the family – one woman, two boys, and two girls – should be deducted as "double counts" from the Kawacatoose base paylist.[235] The family appeared only once on Kawacatoose paylists in 1883, when it was also paid arrears for 1876.

However, paylist analysis prepared for Canada by research consultant Dorothy Sipko disclosed that Angelique Contourier and two children had been paid on the base paylist for the Gordon Band in 1875. According to Ms. Sipko:

> It is true that in 1875 Angelique was paid for herself and only two children. One of these children was found to have been born in 1876, after DOFS at Gordon's and as a descendant would not be entitled to be included in the calculations with Kawacatoose. It is not known for

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234 *Rex v. Findlay,* [1944] 2 DLR 773 at 776 (BCCA).

235 Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, DIAND, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25).

> certainty [sic] that the other child had also been born after Gordon's DOFS, but it was common for agents to pay arrears for the total number of persons present at the later date, irregardless [sic] of their age. If these people were to be included they would be "Double Counts."[236]

Ms. Sipko found that, after receiving "first-time" treaty money of $12 apiece with the Gordon Band in 1875, the family was paid with Kawacatoose in ~~1876 and~~ 1883 before finally settling with the Cowessess Band in 1884. It was there that the family received arrears payments for all the years between 1877 and 1883 except 1878 and 1879.[237]

The significance of Ms. Sipko's findings was clearly spelled out for the First Nation by Ms. Manson:

> As you know in TLE research, the principle of "first in time, first in right" has been followed in such circumstances. This means that if a person or family appears on the base paylist for a number of bands, the band with the base paylist earliest in time has the right to claim the individuals for TLE purposes.
>
> One other question which arose on these facts was the appropriate DOFS and base paylist for the Gordon's Band. Wagner began the Gordon survey in September 1875 but due to bad weather did not complete the survey until July 1876. Annuity payments were not made until late August and September 1876 so Wagner would [have] had to rely on the paylists of 1875.

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236 Ian D. Gray, Counsel, Legal Services, Specific Claims West, to Kim Fullerton, Indian Claims Commission, June 14, 1995, enclosing letters dated May 8, 1995, and June 7, 1995, from Dorothy A. Sipko, Research Consultant, to Jane-Anne Manson, Assistant Negotiator, Specific Claims West, together with paylist analysis and copies of relevant paylists. The passage quoted is from the June 7, 1995, letter (ICC file 2107-15-1).

237 Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, DIAND, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25).

> The Gordon's base paylist thus precedes the Kawacatoose paylist by one year. On this basis the Contouriers would not [be] eligible to be counted as absentees with Kawacatoose.[238]

The foregoing passage succinctly states Canada's position on this issue.

Counsel for Kawacatoose countered that there is not sufficient evidence or information before the Commission on which to base a decision on the question of whether the members of the Contourier family constitute "double counts." In the view of counsel, the date of first survey and base paylist for the Gordon Band must first be determined, but this determination should not be done without the involvement of that band. Counsel noted that the only research currently available is that undertaken on behalf of Canada, since the Gordon Band has been unable to obtain funding and therefore has not conducted any research of its own.[239]

As noted previously, three members of the Contourier family were counted on the Gordon paylist for 1875, whereas five people were paid arrears with Kawacatoose for 1876. Counsel for the First Nation seized upon this discrepancy to urge the Commission to consider counting the two additional people with Kawacatoose, noting that it was possible the two may still be eligible depending on whether they were born before or after 1875. If they were born before 1875, they would be eligible to be counted with Kawacatoose, since they were not on the Gordon base paylist; if born after 1875, they would be descendants of individuals on the 1875 base paylist for the Gordon Band and thus would be ineligible to be counted with Kawacatoose. By

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238 Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, DIAND, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25).

239 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 25; ICC Transcript, October 24, 1995, pp. 212-13 (Stephen Pillipow).

employing this reasoning, together with some innovative mathematics which will be set out in greater detail in the next section of this report, counsel for the First Nation submitted that a final DOFS population of 213 can be achieved for Kawacatoose. As stated at the outset of this report, 213 is the threshold figure which Canada claims must be met before Canada will recognize that it has an outstanding lawful obligation to the First Nation with regard to treaty land entitlement.

While we feel some sympathy towards the Kawacatoose First Nation and its counsel, given the fact that they were surprised by the revelations regarding the Contourier family, we must nevertheless conclude that the evidence on this issue is quite clear. The documents reviewed by us disclose that the Gordon survey was in fact begun in 1875 and completed in 1876, prior to the payment of the 1876 annuities. On this basis, it would seem appropriate to consider the 1875 paylist as the base paylist for the Gordon Band. In this conclusion we draw support from the work of the OTC in "Research Methodology for Treaty Land Entitlement (TLE)," which also concluded that the base paylist year for the Gordon Band was 1875.[240]

In the absence of any other evidence on the point, we are also driven to agree with Ms. Sipko's conclusions regarding the three members of the Contourier family counted with the Gordon Band in 1875 and the additional member who was born in 1876. This latter individual must be regarded as the descendant of a person counted on the base paylist for the Gordon Band and is therefore ineligible to be included in the calculations for Kawacatoose. As for the fifth member of the family counted in 1876 with Kawacatoose, there is insufficient information on which to determine whether this individual was born before or after 1875. It seems quite clear, however, that this

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[240] Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement" (Saskatchewan, 1994), p. 79 (ICC Exhibit 29).

individual was a member of the family and should be counted with the rest of the family as a member of the Gordon Band's base paylist. Therefore, we conclude that all five members of the Contourier family should be excluded from the DOFS population for Kawacatoose.

Conclusions Regarding the DOFS Population

The positions of the parties regarding the date-of-first-survey population of the Kawacatoose First Nation (excluding late additions) are summarized as follows:

	Canada	**Kawacatoose**
1876 base paylist	146	146
Fort Walsh families	–	13
Contourier family	–	2
Absentees and arrears	51	52
Total	**197**	**213**

The foundations of the base paylist figure of 146 and of the membership of the two Fort Walsh families and the Contourier family have been dealt with at length previously in this report and should require no further elaboration. For present purposes, we are proceeding on the basis that the First Nation's final position is that only two members of the Contourier family should continue to be included in the DOFS population count.

It will be noted that the parties have differing views of the number of absentees and arrears to be added to the base paylist population. In addition to these differences, the figure of 54 relied upon by Kawacatoose in its closing submissions (including two members of the Contourier family) represents a decrease of only one from the 55

included in the First Nation's original claim for outstanding treaty land entitlement on April 15, 1992, even though three members of the Contourier family have been excluded from the final count. Similarly, the 51 absentees and arrears in Canada's closing position vary from the total of 56 set forth in the report prepared on Canada's behalf by Theresa Ferguson on July 31, 1992.

The difference in Canada's final figure is readily explained by the exclusion of all five members of the Contourier family. The Kawacatoose count involves the "innovative mathematics" referred to in the preceding section of this report, which are more fully described in the First Nation's closing submissions:

> In the Kawacatoose Analysis [of April 15, 1992] it shows 55 arrears and absentees were paid with Kawacatoose. Canada's Analysis [of 56 by Theresa Ferguson] includes all of these individuals except for one, #15/9 Keeahkeewaypew. Canada counts only three for this family being paid arrears and not four as was counted in Kawacatoose Analysis. However, Canada counts two additional people as absentees under #12 Nesookamisk. These two people were not counted by Kawacatoose in their Analysis. If these two people are counted with Kawacatoose then this will increase the Arrears and Absentees to 57 less the three Gordon's Double Counts [the three excluded members of the Contourier family] for a total of 54.[241]

It can be seen from the foregoing passage that the parties are in agreement with respect to 54 of the arrears and absentees described in the Kawacatoose analysis, and the First Nation is willingly prepared to accede to Canada's position with regard to the two members of the Nesookamisk family. The only individual in dispute is the fourth member of the Keeahkeewaypew family, and we have scant evidence and no argument before us to assist us in making a determination in relation to this person.

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241 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 27.

In light of our conclusion regarding the Contourier family, however, the membership of this individual in the Keeahkeewaypew family is a moot point in the context of the threshold DOFS population of 213 urged by Canada. We recommend that the final count be 210, comprising of a base population of 146, the 13 members of the Fort Walsh families, and 51 absentees and arrears. The inclusion of the fourth member of the Keeahkeewaypew family can only serve to bring the possible total to a maximum of 211. We are therefore satisfied that Kawacatoose has not established a DOFS shortfall, since the First Nation has received enough land for 212 individuals. Nevertheless, having regard for our conclusions with respect to the second issue before the Commission, we recommend that the parties undertake such additional research as may be required or justified to clarify the status of the fourth member of the Keeahkeewaypew family and to confirm whether the number of absentees should be 51 or 52.

ISSUE 2: NATURE AND EXTENT OF TREATY LAND ENTITLEMENT

The second issue before the Commission in this inquiry is virtually identical to the issue addressed by us in our recent Fort McKay First Nation Inquiry Report.[242] Although the parties in the Fort McKay inquiry were unable to agree on the formulation of this issue, the parties to this inquiry have agreed to word the issue in this fashion:

> **Assuming, for the purposes of this inquiry, that the date-of-first-survey formula for determining outstanding treaty land entitlement is the appropriate formula to be applied and without prejudice to the position that other formulas are applicable under the terms of Treaty 4, does the First Nation have an outstanding treaty land entitlement**

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[242] Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995).

on the basis that the additions (new adherents, landless transfers, and marriages to non-treaty women) to the First Nation after the First Nation's date of first survey:

(a) are entitled to land under the terms of Treaty 4; and/or

(b) are to be counted in establishing the First Nation's date-of-first-survey population to determine if the First Nation has an outstanding treaty land entitlement?

The principles established by us in the Fort McKay inquiry have now been made public and we see nothing in the facts of the present case or the submissions of counsel that would cause us to alter those principles in general terms or to apply them differently to the Kawacatoose claim. We hereby adopt and incorporate by reference our reasons in the Fort McKay report, subject to our comments herein. There are certain minor factual differences in the cases which should be addressed, as well as a number of key findings and principles which bear emphasizing.

As in the Fort McKay inquiry, our task is to determine the full and proper meaning of the treaty as to who should be counted and when they should be counted. The relevant section of Treaty 4 is reproduced here:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, *to assign reserves for said Indians*, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada, appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .[243]

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[243] Treaty No. 4 (ICC Exhibit 28, p. 6). Emphasis added.

Just as Treaty 8 did in relation to the Fort McKay First Nation, Treaty 4 stipulates a reserve land entitlement formula of one square mile per family of five "*or in that proportion for larger or smaller families*" to be set aside. It should also be noted that, whereas in Treaty 8 Canada undertook "to lay aside reserves *for such bands* as desire reserves,"[244] in Treaty 4 the undertaking was "to assign reserves *for said Indians*," with the selection to be made following a conference with the band. In our view, Canada's obligation to calculate a band's land entitlement on a per capita basis is even clearer under Treaty 4 than it is under Treaty 8. However, Treaty 4 is very similar to Treaty 8 in stating that the reserve area is to be "selected" by the surveyor in the field, suggesting that the date for establishing the quantum of reserve land is the time of selection by the bands and survey by Canada.

In dealing with the Indians of Treaty 8 in the Fort McKay report, we concluded that those northern First Nations had not yet ordered themselves into cohesive bands by the date of first survey, meaning that it was not possible for a surveyor simply to go out into the field, to determine the population of each band, and to calculate reserve entitlement for each band in the treaty area. Counsel for Canada submitted that this sort of conclusion would be less applicable to First Nations under Treaty 4:

> First, if I might just go back to the point about groups of people coming in, you know, a family at a time or groups of families at a time. I would submit that that is more appropriate to the Treaty 8 sort of northern analysis [than] it is here. The indications here are that the great bulk of the members of the band were there on the Date of First Survey and of course there is a great deal of flexibility and fluidity among membership in these bands, but the people who joined subsequently, they are nowhere near as

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244 *Treaty No. 8, June 21, 1899* (Ottawa: Queen's Printer, 1966), 12.

> significant a factor as they may be in some of the northern communities in Alberta for example.[245]

As we stated at the time, counsel's point is well taken, but it was nevertheless the case that even bands under Treaty 4 had not become the neat, self-contained units that would have better suited Canada's administrative convenience. At the meetings leading up to the signing of Treaty 4, it was evident that the government party thought that settlement would not advance into the area in the near future, and that, therefore, the need for reserves was not urgent:

> We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you have now until the land is actually taken up.[246]

Throughout the negotiations, references to reserve surveys implied a non-specific future date within the next couple of decades:

> We are ready to promise to give $1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five. . . .
>
> When you are ready to plant the Queen's men will lay off Reserves so as to give a square mile to every family of five persons. . . .[247]

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245 ICC Transcript, October 24, 1995, pp. 181-82 (Bruce Becker).

246 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 96 (ICC Documents, p. 14).

247 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 93 and 96 (ICC Documents, pp. 12 and 14).

These statements suggest that the Crown intended to provide reserve land to Treaty 4 Indians as advancing settlement and the dwindling supply of buffalo forced the Indians to settle and convert to an agrarian-based economy, and as new bands formed or existing bands took in new members. Implicit in this intention is the possibility of multiple surveys.

In considering Canada's lawful obligation under Treaty 4, we are faced with the same ambiguities in dealing with late adherents, landless transfers, or the descendants of such individuals as those that arose in dealing with Treaty 8 in the Fort McKay inquiry. For the reasons set forth in our Fort McKay report, we are again driven to the conclusion that the intention under Treaty 4 was that every treaty Indian is to be included in an entitlement calculation. As Mahoney J stated in *R. v. Blackfoot Band of Indians*[248] in relation to the nature of Treaty 7:

> It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether those Indians were members of the five bands or not. The chiefs and counsellors of the five bands were represented and recognized as having authority to treat for all those individual Indians. The treaty was made with Indians, not with bands. It was made with people, not organizations. . . .
>
> It was Indians, not bands, who ceded the territory to Her Majesty and it was to Indians, not bands, that the ongoing right to hunt was extended. The cash settlement and treaty money were payable to individual Indians, not to bands. The reserves were established for bands,

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248 *The Queen v. Blackfoot Band of Indians* [1982] 3 CNLR 53, at 61.

> and the agricultural assistance envisaged band action, but its population determined the size of its reserve and amount of assistance.[249]

As we concluded in the Fort McKay inquiry:

> Treaty 8 is not different from Treaty 7 in any material respect, and the wording of the preamble to each is practically identical. It follows that these findings are properly applied in the interpretation of Treaty 8.
>
> The central point from the *Blackfoot* case is that it was the intention of the Crown to enter into an agreement with all Indians inhabiting the treaty area, *whether or not they were members of a band at the time the treaty was signed*. It follows, in our view, that the obligation of the Crown, as stipulated in the treaty, is to provide land for all Indians in the Treaty 8 area when they become members of a band.[250]

Subject to the references to the treaty numbers, these conclusions apply, word for word, to the terms of Treaty 4. We would also reiterate the following conclusions from the Fort McKay report:

1 It is unreasonable to believe that the Indians would have been prepared to sign a treaty that would give some of them no land in return for ceding their aboriginal rights to the treaty territory, since land was extremely valuable to First Nations people, both culturally and economically.

2 It is unlikely that the Indians would have accepted the treaty if they had understood that the Crown's intention was to exclude some members of the community – namely, those who joined the band after the date of the survey or were simply absent at that time, but who would nonetheless be drawing on the land base – from the determination of a fair reserve land entitlement.

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249 *The Queen v. Blackfoot Band of Indians* [1982] 3 CNLR 53, at 61.

250 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 55-56.

3 We found as a fact that the Indians of Treaty 8 were "scattered throughout inaccessible territory, hunting in small family groups, and many had no interest in the treaty or joining a band."[251] For that reason, we concluded that "it would have been impossible to require all Indians [under Treaty 8] to adhere to treaty and join a band by the date of first survey."[252] Although the circumstances were different for the Indians of Treaty 4, the conclusion is the same. The Indians in the Treaty 4 area were in a period of great transition. The destitution, hardship, and starvation associated with the time of treaty meant that, while many Indians were attempting to assure their daily needs by settling, many others sought to sustain themselves by extending the hunt over an increasingly large territory and, like the Indians of Treaty 8, had no interest in Treaty 4 or in permanently joining a band. As with Treaty 8, obligatory membership in a band by date of first survey would have been unacceptable to the Indians of Treaty 4.

4 The Indian signatories to the treaty could not have understood that treaty land entitlement was to be based on a one-time population count as of the date of arrival of a surveyor from Canada. As we discussed in the Fort McKay report, in *Nowegijick v. R.*, the Supreme Court of Canada approved the principle that Indian treaties must be construed "not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians."[253]

5 A fair and reasonable reading of Treaty 4 leads to the conclusion that, in return for ceding their aboriginal interest in the large area of southern Saskatchewan and lesser parts of Manitoba and Alberta contemplated by the treaty, each and every aboriginal person who accepted treaty secured an entitlement to land, calculated with reference to the number of individuals who so accepted.

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251 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 58.

252 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 58.

253 *Nowegwick v. The Queen* [1983] 1 SCR 29 at 36, 2 CNLR 89 at 94. This passage was relied on again by the Supreme Court of Canada in *Simon v. The Queen* [1985] 2 SCR 387 at 402.

6 We see nothing in the terms of the treaty to support the rigid DOFS approach proposed by Canada. The treaty does not specify that a single survey will be undertaken; rather, it specifies a *process* of selection and survey. As to Canada's submission that the evidence of subsequent conduct demonstrates that the treaties were meant to provide for a one-time survey based on the DOFS population, we have concluded, upon review of the various documents before the Commission and, in particular, Elaine Davis Report,[254] that the evidence speaks more to Canada's attempts to identify and to justify its treaty land entitlement policy than to the meaning suggested by counsel for Canada.

7 Treaty land entitlement is a collective right of a First Nation that must be determined utilizing the number of treaty Indians who are or become members of that First Nation, subject to the principle that every treaty Indian is to be included – once – in an entitlement calculation.

In the course of our reasons in the Fort McKay inquiry, we referred to certain well-defined principles with respect to the interpretation of Indian treaties:[255]

- Treaties should be given a fair and liberal construction in favour of the Indians, and treaties should be construed not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.[256]

- Since the honour of the Crown is involved, no appearance of "sharp dealing" should be sanctioned.[257]

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254 Elaine M. Davies, Research Consultant, Litigation Support, "Treaty Land Entitlement -- Development of Policy: 1886 to 1975," November 15, 1994 (ICC Exhibit 31).

255 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 63-64.

256 See *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36, 2 CNLR 89 at 94, as followed in *Simon v. The Queen*, [1985] 2 SCR 387 at 402, [1986] CNLR 153 at 167.

257 See *R. v. Taylor and Williams*, [1981] 3 CNLR 114 at 123.

- If there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible.[258]

- Regard may be had to the subsequent conduct of the parties to ascertain how the parties understood the terms of the treaty.[259]

Applying these interpretive principles to Treaty 4 leads again to the following findings about the nature and extent of treaty land entitlement which arose in our analysis of Treaty 8 in the Fort McKay inquiry:

1 The purpose, meaning, and intent of the treaty is that each Indian band is entitled to a certain amount of land based on the number of members, and each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band (or, in the alternative, to lands in severalty).

2 The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of a band, that entitlement crystallized at the time of the first survey of the reserve. The quantum of land to which the band was entitled in that first survey is a question of fact, determined on the basis of the actual band membership – including band members who were absent on the date of first survey. This later group of individuals is generally referred to as "absentees."

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[258] *R. v. Taylor and Williams*, [1981] 3 CNLR 114 at 123, applying *R. v. White and Bob*, [1965] 50 DLR (2d) 613 at 652 (BCCA), affirmed, [1965] 52 DLR (2d) 481 (SCC).

[259] *R. v. Taylor and Williams*, [1981] 3 CNLR 114 at 123; *R. v. Sioui*, [1990] 3 CNLR 127 at 140-41; and *R. v. Ireland*, [1991] 2 CNLR 120 (OCJGD) at 128 and 129.

3 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the date of first survey. The quantum of additional land to which the band is entitled as a result of such late adherents is a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the band. These individuals are generally referred to as "late adherents."

4 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who transferred from one band to another, provided that the band from which that Indian transferred had never received land on his or her account. These individuals are generally referred to as "landless transfers" and sometimes as "landless transferees."

5 After the date of first survey, natural increases or decreases in the population of the band do not affect treaty land entitlement. Thereafter it is only late adherents or landless transfers in respect of whom treaty land has never been allocated that will affect treaty land entitlement.

6 Treaty Indian women from the same treaty who marry into a band do not give rise to an additional land entitlement, unless those women are either landless transfers or late adherents in their own right. Non-treaty Indian women who marry into a band do not give rise to an additional land entitlement under any circumstances.

7 The population of the band at the date the treaty is signed is not relevant to the determination of the quantum of the band's land entitlement.

8 The current population of a band is not relevant to the determination of the quantum of the band's land entitlement and natural increases in the population of a band do not give rise to treaty land entitlement.

9 If a band receives a surplus of land at date of first survey, Canada is entitled to credit those surplus lands against subsequent landless transfers or late adherents.

10 Establishing a date-of-first-survey shortfall is not a prerequisite for a valid treaty land entitlement claim.[260]

We are satisfied that all the foregoing principles and findings are just as applicable to Kawacatoose in the present case as they were to the Fort McKay First Nation in the previous inquiry before the Commission. A couple of points, however, are worthy of elaboration.

In our first finding above, we noted that "each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band (or, in the alternative, to lands in severalty)." The reference to severalty arises from the particular terms of Treaty 8, which states:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the following manner, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting

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[260] Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 64-65.

> with the Indians concerned as to the locality which may be found suitable and open for selection.[261]

There is no parallel severalty clause in Treaty 4. In applying those findings to Kawacatoose, this difference does not cause us to change the findings we made with regard to treaty land entitlement in the Fort McKay inquiry.

Our fourth finding above deals with landless transfers and states that "[t]he treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who transferred from one band to another, provided that the band from which that Indian transferred had never received land on his or her account." Having regard for the additional submissions which were made before us in the present inquiry, we now wish to take the opportunity to clarify its meaning. We recognize that treaty land entitlement, if endlessly portable on the backs of landless transferees who migrate from band to band, can quickly become very complicated and confused, giving rise to the possibility of competing claims to the transferee's membership from two or more bands. For this reason, we recommend that a landless transferee's right to be counted should remain with that individual until he or she joins a band which has received some or all of its reserve land under treaty. Until the individual joins a band that has had a treaty land entitlement calculation done, he or she should retain the right to be counted with any band for which such a calculation has not yet been undertaken. This in fact takes the meaning closer to the original term, which was "transfer from a landless band."

However, once the individual joins a band which has received treaty land to some extent, the right to be counted should then crystallize and become part of the

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261 *Treaty No. 8, June 21, 1899* (Ottawa: Queen's Printer, 1966), 12-13.

collective right of that band. In this fashion, much of the "chaos" envisioned by counsel for Canada as arising from individuals becoming members of several bands for varying periods of time should be avoided, even though, as noted in the Fort McKay report, in any event these issues have not proven to be insurmountable in practice.

Other Considerations Raised by the Parties

The submissions before the Commission with regard to this issue are remarkably similar to those which were before us in the Fort McKay inquiry. In our report on that inquiry, we have already dealt with the following issues which, in our opinion, do not warrant additional discussion at this time:

1 Canada's objection that allowing post-DOFS additions to band membership in determining treaty land entitlement results in a type of selective, "asymmetrical," floating treaty land entitlement,[262] in which population increases are considered but decreases are ignored, is met by recognizing that additions to band populations through new adherents and landless transfers are distinct from natural population increases.

2 Canada cannot object to the "artificiality" of deeming late additions to have been members of a band's DOFS population, even if many of those individuals were not even alive at that date, since that artifice has arisen from Canada's own 1983 ONC Guidelines to mesh with Canada's view that its lawful obligation was based solely on DOFS population. As we stated in Fort McKay:

> Late adherents and landless transfers are counted not because they notionally should have been counted at DOFS, but because they have never been included in an entitlement calculation. Therefore,

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262 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 36-38.

> whether a post-DOFS addition was alive at DOFS is irrelevant.[263]

3 Our recommended approach factors in both natural increases and decreases in the population of a band's post-DOFS additions.

4 The possibility of multiple surveys, which continues until all treaty Indians have been included in an entitlement calculation and all treaty bands have had their full treaty land entitlement calculated, nevertheless cannot lead to a never-ending obligation simply because the number of treaty Indians to be counted is finite and detailed genealogical information is generally available with respect to them.

5 Although the Crown has a fiduciary duty to live up to its treaty obligations, this issue is subsumed in determining whether Canada's interpretation of the treaty is correct. The issue is not whether Canada "chose" to interpret the treaty in a manner that restricts the entitlement of First Nations and thus improperly exercised its "discretion," or whether Canada is treating First Nation signatories to the treaty unequally.

6 We view the 1983 ONC Guidelines as one possible interpretation of the treaty, but the more fundamental concern in establishing Canada's lawful obligation to First Nations is to determine what the treaty says about treaty land entitlement. As we stated in Fort McKay:

> Furthermore, although subsequent conduct is relevant to the interpretation of the treaty, we agree with Canada that, in the light of the entire historical record, it is difficult to discern a consistent pattern of subsequent government conduct with respect to treaty land entitlement. Indeed, the government has altered the ground rules many times. At the end of the day, therefore, the government's reliance on the [1983] ONC Guidelines for over 10 years is relevant only in so far as it illustrates that even the government considered the post-DOFS additions approach to be a reasonable interpretation of the treaty for

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263 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 67.

approximately a decade.[264]

Estoppel by Representation

Counsel for Kawacatoose raised estoppel by representation as an alternative basis for establishing Canada's lawful obligation to provide additional land to satisfy the First Nation's claim for outstanding treaty land entitlement. In essence, the submission is that, if the Commission does not agree that late additions such as new adherents and landless transfers are entitled to be included in the First Nation's DOFS population, Canada is nevertheless estopped from relying on its strict legal rights under the doctrine of estoppel by representation because:

1 through the 1983 Guidelines, the previous validation of some seven Saskatchewan First Nations on the basis of late additions, and the specific treaty land entitlement research instructions provided to Kawacatoose on May 13, 1991, Canada has represented to the Federation of Saskatchewan Indian Nations and directly to Kawacatoose that validations based on late additions would be forthcoming;

2 it was reasonable for Kawacatoose to act on those representations, and it did so; and

3 as a result of the First Nation's reliance on Canada's representations and Canada's unilateral and unexpected changing of the rules, Kawacatoose has suffered detriment or prejudice in the form of thrown-away research and legal costs, loss of expectation, and the loss of the opportunity to have a validated claim since the First Nation did not know that there was a limited time frame within which Canada was prepared to accept claims for negotiation on the basis of late additions.

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[264] Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 72.

The result, according to Kawacatoose, is that "Canada cannot now state that Additions to Kawacatoose after its Date of First Survey are not entitled to land under Treaty No. 4 or will not be included in determining Kawacatoose's Date of First Survey Population."[265] Canada's response is that it is not bound by its previous statements and actions, which represent little more than mistake of law by Canada's representatives or without prejudice statements in furtherance of settlement of earlier claims.

In light of our earlier conclusions regarding the nature and extent of treaty land entitlement, we do not find it necessary to address the issue of estoppel by representation in the present case.

Satisfaction of the Treaty Obligation to Provide Reserve Land

Kawacatoose argues that it has a valid treaty land entitlement claim based on either late adherents and landless transfers or, alternatively, upon a DOFS shortfall. Canada has denied any outstanding treaty land entitlement, and, as a result, has not addressed in its submission the number of late additions to be included with the base paylist population (plus absentees and arrears) to arrive at the appropriate population to satisfy the First Nation's outstanding treaty land entitlement. The only information generated at Canada's request is the report by Theresa Ferguson, which states: "This report is prepared at the request of the Specific Claims Branch West and does not necessarily represent the views of the Government of Canada."[266] With this caveat in mind, we will nevertheless employ the figures in Ms. Ferguson's report as a preliminary statement of Canada's position. It should also be noted that the numbers for both Canada and

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265 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 76.

266 Theresa A. Ferguson, *Report on the Kawacatoose Band Date of First Survey Population*, July 31, 1992, p. 1 (ICC Documents, p. 249).

Kawacatoose have been amended to reflect our findings in relation to the two Fort Walsh families and the Contourier family.

The positions of the parties, then, are set out as follows:

	Canada	Kawacatoose
1876 base paylist	146	146
Fort Walsh families		13
Contourier family		2
Absentees and arrears	51	52
New adherents	43	
Landless transfers	19	
New adherents and landless transfers		26
Eligible in-marrying non-treaty women	5	2
TOTAL	**264**	**241**

While at first glance it may appear unusual that the number put forward by Canada exceeds the figure advanced by Kawacatoose, counsel for the First Nation explained the discrepancy in this manner:

> It is not surprising that Canada's Analysis shows more Additions than Kawacatoose's Analysis as Kawacatoose's Analysis was done in great haste to get this submission into Canada's hands prior to the finalization of the Framework Agreement negotiations. When it was submitted to Canada, it was obvious, considering Al Gross's letter of January 20, 1992, and by using the 1983 Guidelines that Kawacatoose had an outstanding Treaty land entitlement. There was no need to look any further at that time for further Additions to Kawacatoose.[267]

Clearly, counsel for Kawacatoose does not believe that the figures contained in the initial request by the First Nation in April 1992 have been fully researched or that they

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[267] Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 69.

represent any true reflection of the number of post-DOFS additions. Indeed, counsel submits that "Kawacatoose agrees that the 67 Additions listed in Canada's Analysis should be counted as Additions for Kawacatoose."[268] However, in fairness to Canada, it must also be remembered that, in light of its position in relation to treaty land entitlement generally, Canada has not made any representations with respect to whether any of the foregoing figures can be considered accurate. With these considerations in mind, we recommend that the parties meet to review the population analyses presented before the Commission and to undertake such further research as may be required to substantiate the numbers set forth in the Ferguson report. In the meantime, we have concluded, on a preliminary basis, that the First Nation's treaty land entitlement claim should be based on the following figures:

1876 base paylist	146
Fort Walsh families	13
Contourier family	0
Absentees and arrears	51
New adherents	43
Landless transfers	19
Eligible in-marrying non-treaty women	5
TOTAL	**277**

It is our opinion that Kawacatoose has a valid treaty land entitlement claim based on late adherents and landless transfers in accordance with the findings as set out above. Therefore, we accept, on the basis of the evidence put before us, that the First Nation is entitled to the following acreage of additional reserve land:

Treaty land entitlement (277 x 128 acres per person)	35,456

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268 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 69-70.

Land provided in September 1876 survey	27,200
Outstanding treaty land entitlement	8,526

Alternatively, 8526 acres may be expressed as an additional entitlement of approximately 13.32 square miles.

ISSUE 3: SASKATCHEWAN FRAMEWORK AGREEMENT[269]

The parties have stated the third issue in this inquiry in these terms:

> **Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands which are party to the Framework Agreement?**

This issue requires a review of the relevant terms of the Framework Agreement and an assessment of the substantive rights, if any, which that agreement confers upon First Nations such as Kawacatoose that are not parties to it.

It will be recalled that the Framework Agreement came about in large part as a result of the failure of the Saskatchewan agreement and the subsequent commencement of litigation on behalf of the Saskatchewan First Nations that had been accepted for negotiation of treaty land entitlement claims pursuant to that agreement. The Framework Agreement grew out of the report and recommendations of the Office of the Treaty Commissioner for Saskatchewan, which developed the "equity formula" as

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269 Indian Government of Saskatchewan, *Treaty Land Entitlement Framework Agreement* (Saskatchewan, 1992).

a fair and reasonable means of resolving the outstanding treaty land entitlement claims of the Entitlement Bands.

The Framework Agreement was executed by Canada and the Province of Saskatchewan as of September 22, 1992, and at once came into force between those parties. At the same time, as a result of the negotiations leading to the Framework Agreement, it became necessary to replace the original Cost Sharing Agreement, which had been entered into on September 13, 1991, between Canada and Saskatchewan in anticipation of the Framework Agreement, with the Amended Cost Sharing Agreement.

Although the Cost Sharing Agreement and the Amended Cost Sharing Agreement were between Canada and Saskatchewan only, the Framework Agreement included the 26 Entitlement Bands as parties. The Entitlement Bands had the option of signing the Framework Agreement immediately or adhering to it on or before March 1, 1993, but the Framework Agreement itself did not come into force between an Entitlement Band and the two levels of government until a Band Specific Agreement between the Entitlement Band and Canada was concluded. A Band Specific Agreement had to be concluded within three years after the September 22, 1992, execution of the Framework Agreement by Canada and Saskatchewan, failing which the financial obligations of the two governments to the Entitlement Band under the Framework Agreement would terminate.

Within the terms of the Framework Agreement, Canada, Saskatchewan, and the Entitlement Bands "agreed to disagree" with regard to the extent of the treaty land entitlement obligations owed by the two governments to the Entitlement Bands, although all the parties concurred that such obligations did exist. As stated in the recitals to the Framework Agreement:

P. Canada recognizes that it has unfulfilled obligations in respect of Treaty land entitlement in respect of the Entitlement Bands and is desirous of ensuring that such obligations are fulfilled;

Q. Canada is of the opinion that its outstanding Treaty land entitlement obligation to the Entitlement Bands is, at most, limited to the respective Shortfall Acres (including Minerals) of each Entitlement Band;

R. Saskatchewan is also of the opinion that the outstanding Treaty land entitlement obligation of Canada to the Entitlement Bands is limited to Shortfall Acres as aforesaid;

S. The Entitlement Bands are of the opinion that the outstanding Treaty land entitlement obligation of Canada to such Entitlement Bands is determined by multiplying the current population of an Entitlement Band by one hundred and twenty-eight (128) acres and subtracting therefrom the area of such Entitlement Band's existing Reserve Land which was set apart by Canada for the use and benefit of such Entitlement Band for Entitlement Purposes. . . .

Nevertheless, the parties agreed that Canada's outstanding treaty land entitlement obligations would be fulfilled in accordance with the terms and conditions set out in the Framework Agreement. Moreover, in consideration of the financial and other contributions to be made by Saskatchewan pursuant to the Framework Agreement and the Amended Cost Sharing Agreement, Saskatchewan's obligations to provide unoccupied Crown land and minerals to Canada under the Natural Resources Transfer Agreement of 1930 would also be considered to be fulfilled. Releases and indemnities were included to ensure that no claims would be made against Canada or Saskatchewan for proceeding on the basis of the Framework Agreement, and that existing litigation would be held in abeyance and, upon fulfilment of the terms of the Framework

Agreement, discontinued. The releases apply only to land entitlement and not to other treaty rights, or to surrender or other claims under Canada's Specific Claims Policy, or to rights that might relate to traditional lands.

Under the terms of the Framework Agreement, Canada and Saskatchewan agreed to pay on a cost-shared basis the sum of $503 million over a period of 12 years, with those funds to be applied to enable the Entitlement Bands to acquire up to 1.7 million acres of land with reserve status, and to compensate rural municipalities and school divisions for tax losses. The maximum available to the rural municipalities was $25 million, with the same ceiling for the school divisions. Under the terms of the Amended Cost Sharing Agreement, Canada and Saskatchewan are to split the foregoing costs on a 70–30 basis, with Canada being able to recoup up to 19 per cent of the costs, resulting in a possible 51–49 split. Saskatchewan is to reimburse Canada based on the anticipated savings Saskatchewan will realize from Canada's assumption of financial responsibility for costs attributable to persons residing on land which becomes reserve land as a result of the implementation of the Framework Agreement and the Band Specific Agreements.

Each Entitlement Band is to use its best efforts within the 12-year period to acquire the number of "shortfall acres," including minerals, identified for the Band in Schedule 1 of the Framework Agreement, to convert those acres to reserve status, and to transfer unencumbered title to Canada. Once an Entitlement Band has completed these steps, it can then use the balance of its settlement funds (a) to acquire additional land with reserve status up to the greater of the acreage determined using the equity formula or the Saskatchewan formula (both of these amounts also being defined in Schedule 1), or (b) for other Band development purposes. Recognition of and

compensation for a higher quantum under the Saskatchewan formula is referred to in the Framework Agreement as the "Honour Payment."

In determining the area of land owed to each Entitlement Band under the terms of the Framework Agreement, the Band's adjusted-date-of-first-survey (ADOFS) population forms the basis of the calculation. The final ADOFS population for each Entitlement Band was, according to section 1.01(5) of the Framework Agreement, negotiated and agreed upon between Canada and the Band and set forth in Schedule 1, but the Framework Agreement does not clearly illustrate the precise criteria contemplated in the ADOFS population. However, Mr. Westland testified that the ADOFS population in the context of the Saskatchewan Framework Agreement includes – in addition to the DOFS population composed of the base paylist population plus absentees and arrears – new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women.[270]

Article 17: Other Indian Bands

The key provision of the Framework Agreement for the purposes of this inquiry is Article 17, which states:

> **17.01 NO PREJUDICE:**
>
> Nothing in this Agreement shall be interpreted in a manner so as to prejudice:
>
> (a) the rights or obligations of Canada in respect of any Indian band not a party to this Agreement; or
>
> (b) the rights of any Indian band not party to this Agreement;

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270 ICC Transcript, December 16, 1994, p. 157 (Rem Westland).

including, without limitation, any Indian band in respect of which Canada may hereafter accept for negotiation a claim for treaty land entitlement.

17.02 NO CREATION OF RIGHTS:

Nothing in this Agreement shall be interpreted in a manner so as to create or expand upon rights or confer any rights upon, or to the benefit of, any Indian band not a party to this Agreement.

17.03 APPLICABILITY OF THIS AGREEMENT AND THE AMENDED COST SHARING AGREEMENT TO OTHER BANDS:

Canada and Saskatchewan acknowledge that, pursuant to the Amended Cost Sharing Agreement, in the event that it is hereafter determined by Canada that other Bands (other than any Entitlement Band) have substantiated an outstanding treaty land entitlement, on the same or substantially the same basis as the Entitlement Bands, Canada and Saskatchewan shall support an extension of the principles of this Agreement and the Amended Cost Sharing Agreement in order to fulfil the outstanding Treaty land entitlement obligations in respect of such Bands, and, without limitation, acknowledge that they will negotiate any amendments to this Agreement and the Amended Cost Sharing Agreement to ensure that the amounts referred to in Article 5, section 6.2 and section 7.2 thereof are adjusted to ensure that the interests of Canada, Saskatchewan, such Bands and affected local governments are dealt with in a fair and equitable manner.

17.04 OTHER NEGOTIATIONS:

Canada and Saskatchewan agree that nothing in this Agreement shall prejudice the ability of other Bands whose claim has been accepted for negotiation from concluding separate arrangements with Canada to settle their outstanding land entitlement.

Position of the Kawacatoose First Nation

Kawacatoose maintains that there are three bases for its assertion that section 17.03 of the Framework Agreement imposes a legally binding obligation on Canada to validate the First Nation's claim for outstanding treaty land entitlement once Kawacatoose has established entitlement on "the same or substantially the same basis" as the Entitlement Bands. These bases are (1) the fiduciary obligation owed by Canada to Kawacatoose; (2) the contractual relationships between, first, Canada and the Entitlement Bands and, second, Canada and Kawacatoose; and (3) the doctrine of estoppel by representation.

Fiduciary Obligation Owed by Canada

Counsel for Kawacatoose submits that, although the First Nation is not a party to the Framework Agreement, it is a member of the FSIN, which played a "crucial and active role in the negotiation of the Framework Agreement and, in particular, Article 17.03." As stated in the First Nation's written submissions:

> Clearly, Kawacatoose was one of the "Other Bands" with a possible outstanding Treaty land entitlement that all the parties to the negotiations were painfully aware of. It is within this context that Canada's promises must be examined. This context is important because it shows that Canada's promises were not made in a vacuum. The F.S.I.N., the Entitlement Bands and Kawacatoose were there to request those promises. The F.S.I.N., the Entitlement Bands and Kawacatoose [were] there to receive those promises. Kawacatoose relied and acted upon those promises.[271]

In light of the fiduciary obligation owed by Canada to Kawacatoose in respect of treaty rights, counsel contends that Canada's undertakings and representations in section

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271 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 99.

17.03 amount to specific promises to non–Entitlement Bands in Saskatchewan, including Kawacatoose. Once these promises were given, Canada's fiduciary duty to exercise its discretion regarding validation and settlement in a manner that is fair and in the best interests of the non–Entitlement Bands became narrowed, and in fact crystallized into specific obligations from which Canada cannot depart without first obtaining the First Nation's consent. Those obligations are to accept Kawacatoose's outstanding treaty land entitlement claim for negotiation on the basis of the criteria set forth in the 1983 ONC Guidelines, and, once validated, to settle the claim on terms similar to those enumerated in the Framework Agreement and Amended Cost Sharing Agreement.

Contractual Obligation Owed by Canada

Counsel for Kawacatoose asserts that the First Nation's claim is also rooted in two contracts: the Framework Agreement between Canada and the Entitlement Bands, and the "unilateral contract" between Canada and Kawacatoose.

In relation to the Framework Agreement, counsel submits that, since parties to an agreement can agree to benefit a third party who is not party to that agreement, it is open to one of those parties to enforce the benefit on behalf of that third party. The representations and undertakings given by Canada in section 17.03, which benefit Kawacatoose and other non–Entitlement Bands, can be enforced by the Entitlement Bands, which, through a resolution of the Assembly of Entitlement Chiefs dated April

18, 1994,[272] have expressed their support of the treaty land entitlement claims of the Kawacatoose, Kahkewistahaw, and Sakimay First Nations.

With regard to the question of unilateral contract, counsel for Kawacatoose tendered *Carlill v. Carbolic Smoke Ball Company*[273] and the following excerpt from *The Law of Contracts* (2d ed.) by S.M. Waddams in support of the contention that Canada and Kawacatoose are contractually bound:

> UNILATERAL CONTRACTS
>
> The usual case of a bargain involves an exchange of promises. It is not uncommon, however, for a promise to be made in return for the performance of an act. If A promises to pay $1,000 to B if B paints A's house, B might assent to the arrangement (and this would ordinarily operate as a promise by B to paint the house), or he might simply paint the house without communication with A. In the latter case there is no promise by B to do the work (unless commencing the work, as might be argued, operates as a promise to complete it). But B, when he has done the work, is entitled to enforce A's promise. In *Calgary Hardwood & Veneer Ltd. v. Canadian National Ry. Co.*[274] it was held that where the vendor of land said that he would "agree to sell" if the purchaser could obtain the approval of the municipality to the sale, the obtaining of the approval amounted to acceptance of the offer.
>
> It has been said that courts will tend to treat offers as calling for bilateral rather than unilateral acceptance. However, in some cases, the

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272 Federation of Saskatchewan Indian Nations, Assembly of Entitlement Chiefs Resolution No. 42, "Support to Other Bands regarding Validation of TLE Claims," April 18, 1994 (ICC Exhibit 30).

273 *Carlill v. Carbolic Smoke Ball Company,* [1893] 1 QB 256, 9 TCR 124 (UKCA).

274 *Calgary Hardwood & Veneer Ltd. v. Canadian National Ry. Co.* (1979), 100 DLR (3d) 302 (Alta, SC App. Div.).

> only reasonable interpretation of the facts is that the offeror bargained only for a completed act.[275]

On behalf of Kawacatoose, it is submitted that Canada has offered to extend a settlement based on the Framework Agreement to all non–Entitlement Bands that fulfil the condition of substantiating an outstanding treaty land entitlement claim on "the same or substantially the same basis as the Entitlement Bands." Counsel contends that Kawacatoose has substantiated its claim on this basis and, in so doing, has accepted Canada's offer, thereby giving rise to binding contractual obligations owed by Canada to Kawacatoose. Again, those obligations are to accept Kawacatoose's outstanding treaty land entitlement claim for negotiation on the basis of the criteria set forth in the 1983 ONC Guidelines, and, once validated, to settle the claim on terms similar to those enumerated in the Framework Agreement and the Amended Cost Sharing Agreement.

Estoppel by Representation

The First Nation contends that, even if the Commission should conclude that the legal effect of section 17.03 does not create substantive rights for Kawacatoose, Canada should nevertheless be prevented from relying on its strict legal rights by virtue of the doctrine of estoppel by representation. Although the doctrine was not fully delineated by counsel in relation to its applicability to section 17.03 of the Framework Agreement, the Commission understands the First Nation's position to be essentially the following:

1 Canada by its prior conduct and representations, as fully detailed in Part II of this report dealing with the development and evolution of Canada's Specific Claims Policy relating to treaty land entitlement, and culminating in section

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[275] S.M. Waddams, *The Law of Contract*, 2d ed. (Toronto: Canada Law Book Inc., 1984), 122. The second paragraph of the excerpt was added by the Commission.

17.03 of the Framework Agreement, has represented that non–Entitlement Bands would be entitled to validation on the basis of their DOFS populations, including absentees and arrears, together with late additions such as new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women – in essence, the criteria set forth in the 1983 Guidelines. Counsel alleges that Canada made these representations with the intention that they be acted upon or such that a reasonable person would assume that they were intended to be acted upon.

2 Kawacatoose has acted upon these representations by undertaking investigations and research which, according to counsel, has substantiated its claim on the same or substantially the same basis as several of the Entitlement Bands.

3 Kawacatoose by so acting has suffered prejudice or detriment in terms of thrown-away legal and research costs, unfulfilled expectations, and the inability to make a timely claim within the "window of opportunity" through which, prior to that window being unilaterally and unexpectedly closed, at least seven Entitlement Bands were validated.

Assuming that the Commission does not agree that Kawacatoose is owed fiduciary or contractual obligations by Canada in the present context, the strict legal right on which counsel contends that Canada should be estopped from relying is that late additions to the First Nation's DOFS population (new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women) are not entitled to land under Treaty 4 or will not be included in calculating the DOFS population. Nor should Canada be able to deny that it owes a lawful obligation to Kawacatoose with regard to these late additions under the Specific Claims Policy.

Section 17.03 of the Framework Agreement

Even to be able to consider the foregoing bases for claiming that Canada has a binding legal obligation under section 17.03 of the Framework Agreement, the words of that

section and the other provisions of Article 17 must be closely scrutinized to determine whether they support that conclusion. In the course of such scrutiny, counsel for Kawacatoose submits that Article 17 must be interpreted in the context of principles of interpretation applicable to treaties and treaty rights in addition to the more basic principles of contractual interpretation. Within this line of reasoning, the Framework Agreement is a "land claims agreement" in the sense contemplated by section 35 of the *Constitution Act, 1982,* which states:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. . . .
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Assuming that the Framework Agreement is a land claims agreement conferring treaty rights on Kawacatoose, counsel submits that the applicable principles of treaty interpretation are as follows:

1 Treaties and treaty rights must be given a fair, large and liberal construction in favour of the Indians, based on *R. v. Sparrow,*[276] *Nowegijick v. The Queen,*[277] *Simon v. The Queen*[278] and *R. v. Sioui.*[279]

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276 *R. v. Sparrow,* [1990] 3 CNLR 160 (SCC).

277 *Nowegijick v. The Queen,* [1983] 2 CNLR 89 (SCC).

278 *Simon v. The Queen,* [1986] 1 CNLR 153 (SCC).

279 *R. v. Sioui,* [1990] 3 CNLR 127 (SCC).

2 Since the interpretation of Indian treaties involves the honour of the Crown, fairness to the Indians is a governing consideration: *R. v. Agawa*[280] and *R. v. Sparrow*.[281]

3 Section 35(1) and treaty rights must be construed in a purposive way with a generous and liberal interpretation in favour of the Indians: *R. v. Sparrow*,[282] R. v. *Bombay*[283] and *Eastmain Band v. Canada (Federal Administrator)*.[284]

In addition to these principles of treaty interpretation are the more conventional rules of contractual interpretation on which Kawacatoose relies:

> 1. Where there is no ambiguity in the language, it must be given its ordinary or natural meaning. . . .
>
> 2. If there are two possible interpretations, one of which is absurd or unjust, the other of which is rational, the latter must be taken as the correct one. . . .
>
> 3. The intention of the parties is the paramount test of the meaning of the words in a contract. Although words normally mean what the ordinary person would take them to mean, this is only as long as the parties understand and interpret them in the same way. . . .

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279 *R. v. Sioui*, [1990] 3 CNLR 127 (SCC).

280 *R. v. Agawa*, [1988] 3 CNLR 73 (Ont. CA).

281 *R. v. Sparrow*, [1990] 3 CNLR 160 (SCC).

282 *R. v. Sparrow*, [1990] 3 CNLR 160 (SCC).

283 *R. Bombay*, [1993] 1 CNLR 92 (Ont. CA).

284 *Eastman Band v. Canada (Federal Administrator)*, [1993] 3 CNLR 55 (FCA).

> 4. The provision should be construed as a whole giving effect to everything in it, if possible. No word should be superfluous. . . .[285]

In the view of the First Nation, the clear language of section 17.03 of the Framework Agreement, interpreted in a "generous" and "liberal" manner, must be read to say:

> If Canada determines that a "Band," other than an "Entitlement Band," has substantiated an outstanding treaty land entitlement, on the same or substantially the same basis as the "Entitlement Bands," then Canada and Saskatchewan both undertake that they "shall" support an extension of the Framework Agreement and the Amended Cost Sharing Agreement with any necessary amendments "to ensure that the interests" of the parties "are dealt with in a fair and equitable manner."[286]

According to counsel, if Canada is not required to validate the Kawacatoose claim on the same or substantially the same basis as the Entitlement Bands, or if Canada substitutes a different method for validating claims, the key words "on the same or substantially the same basis as the Entitlement Bands" are rendered superfluous and without meaning. Moreover, to allow Canada not to validate claims on the same or substantially the same basis, or alternatively to allow Canada to validate claims on a different basis, would permit an absurd or unjust interpretation of section 17.03 rather than the rational alternative proposed by Kawacatoose. The words "same or substantially the same" speak to the question of validation and the circumstances under which the Entitlement Bands were accepted for negotiation. According to counsel, at least seven Entitlement Bands were validated on the basis of additions to their DOFS

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285 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 80-81.

286 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 81-82.

populations in the same manner now being asserted by Kawacatoose. The foundation of these additions must be the 1983 Guidelines which, if applied to each of the Entitlement Bands, results in a validation in each case.[287]

Counsel emphasized that the January 20, 1992, letter from Al Gross, Director of Treaty Land Entitlement, to Stewart Raby of the FSIN, which stated that "Saskatchewan treaty land entitlement claims are accepted for negotiation on the basis of research conducted pursuant to the 1983 guidelines," was written in the heat of the negotiations leading up to the Framework Agreement. Accordingly, when they were drafting section 17.03, the parties to the negotiations were likely aware of Canada's position as set forth in Mr. Gross's letter "that validation of an outstanding treaty land entitlement was and would continue to be based on the 1983 Guidelines or 'policy.'"[288]

Counsel further relied on the evidence of the three witnesses called to testify with regard to the Framework Agreement – David Knoll, Dr. Lloyd Barber, and James Kerby – as being of assistance in understanding the positions of the parties at the time and the circumstances within which the Framework Agreement was concluded. Counsel contended that, based on the following excerpt from the *Canadian Encyclopedic Digest (Western)* (3d ed.), such evidence if probative can properly be considered in interpreting section 17.03:

> 3. SURROUNDING CIRCUMSTANCES
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> **506** In order that the court may know the object of the parties and those considerations that must have been present to the minds of the parties at the time of the making of the contract, it is permissible for the court to

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287 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 95-96.

288 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 96.

> consider the position of the parties at that time and the surrounding circumstances forming the context within which they made their agreement. The genesis and aim of the transaction may be considered as part of the context of the agreement.[289]

Excerpts from Mr. Knoll's testimony were reproduced in the Kawacatoose submissions to show that FSIN negotiators sought to protect the interests of the Nikaneet, Cowessess, and other non–Entitlement Bands by giving them the opportunity to take advantage of the Framework Agreement as the basis for validating and settling their claims. Alternatively, if some other approach was perceived by a non–Entitlement Band to be more advantageous, that band would have the option to use the alternative approach instead. Article 17 was inserted at the insistence of the Entitlement Bands and was considered by the FSIN negotiators to be more than the simple bilateral understanding between Canada and Saskatchewan suggested by Canada.[290]

Dr. Barber was similarly quoted to show that the Entitlement Bands did not want other bands to be prejudiced by being left out if they were able to justify their claims to be validated. At the same time, in recognition of the sovereignty of each First Nation, the Entitlement Bands did not want to be seen as binding non–Entitlement Bands. Dr. Barber concurred with Mr. Knoll that the Entitlement Bands insisted on the inclusion of Article 17 and that section 17.03 was not simply an agreement between Canada and Saskatchewan. He testified that there was a clear understanding by all parties that the

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289 Vol. 7, p. 447, para. 506.

290 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 84-86.

Framework Agreement should apply to any band which might have a validated treaty land entitlement.[291]

Although Mr. Kerby was called to present Canada's perspective on the Framework Agreement negotiations, and testified that Canada sought to maintain the "status quo" with respect to non–Entitlement Bands, counsel for Kawacatoose highlighted certain portions of his testimony to show that even Canada hoped that all the work which went into the Framework Agreement would not be disregarded and could be applied to other bands in future. Under cross-examination, Mr. Kerby also testified:

> A. "Other bands" is intended to refer to other than the entitlement bands.
>
> Q. Other than the entitlement bands?
>
> A. "Entitlement band" being a defined term.
>
> Q. And so Kawacatoose, Kahkewistahaw and Ocean Man, they're not entitlement bands?
>
> A. Correct.
>
> Q. So they would be considered "another band"?
>
> A. For purposes of 17.03?
>
> Q. Yes.
>
> A. Yes, I guess today, but I would like to add a clarification. They would fall into 17.03 by reference providing they had substantiated

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291 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 86-87.

> an outstanding Treaty Land Entitlement claim on the same or substantially the same basis, that's how they fall into 17.03. So they had to get over the hurdle of substantiating their claim, but then, yes, 17.03 would apply.[292]

Sections 17.01, 17.02, and 17.04

With regard to the remaining sections of Article 17, Mr. Knoll gave evidence that, as the negotiation and terms of the Framework Agreement became more complex, the Entitlement Chiefs became concerned that the manner in which certain issues had been addressed could prejudice the future dealings of non-Entitlement Bands.[293] As a result, Mr. Knoll testified and counsel submits that section 17.01 was included to ensure that the Framework Agreement would not operate in a manner prejudicial to those bands if they chose not to be so prejudiced.[294]

Similarly, section 17.04 and the closing words of section 17.01 were incorporated in the Framework Agreement in recognition that, although the equity formula was the chosen means of settlement within that agreement, not all bands would necessarily want to use that approach.[295] Those choosing not to use the equity formula would therefore retain the freedom to settle their claims on a different basis.

Section 17.02 of the Framework Agreement is entitled "No Creation of Rights." Counsel sought to limit the scope of section 17.02 by relying on the following testimony of Mr. Knoll to explain the rationale for that provision:

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292 ICC Transcript, May 25, 1995, pp. 229-30 (James Kerby).

293 ICC Transcript, May 24, 1995, pp. 101-02 (David Knoll).

294 ICC Transcript, October 24, 1995, p. 135 (Lesia Ostertag).

295 ICC Transcript, October 24, 1995, p. 136 (Lesia Ostertag).

> It was my understanding, also, that the Crown, the Federal and Provincial Governments, had some concerns about the extent to which they were making concessions to conclude this agreement for the entitlement bands and they wanted to make sure that other Indian bands would not be able to use the Framework Agreement necessarily to assert that they had similar rights. And the focus there, it was my understanding, was more on issues like the riparian rights, it was a concession on the part of Canada that they would be prepared to recognize – and the Province – that they would be prepared to recognize riparian rights adjacent to – of entitlement lands adjacent to – or reserve lands adjacent to water bodies, and for that reason 17.02 was inserted. At least that's what I understood at the time to be the approach that was taken, they wanted to make sure that an Indian band who had a regular reserve would not be able to say, "Look at the Framework Agreement, you recognized that a reserve adjacent to a water body had riparian rights and, therefore, we claim the same rights." They wanted that riparian right to be asserted independent of a reference to the Framework Agreement.[296]

Mr. Knoll's "will say" also deals with section 17.02:

> 3. Because Canada and Saskatchewan were concerned about the unique way in which minerals, water, third party and other process issues were dealt with, they wanted to ensure that this Agreement did not create similar rights for other Indian Bands. For that reason Article 17.02 was inserted. In particular, the recognition of riparian rights, sale of minerals, transfer of undisposed minerals, co-management arrangements dealing with water and the freeze on the disposition of lands selected, were of some concern if these were extended to other Indian Bands as a right of benefit.[297]

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296 ICC Transcript, May 24, 1995, pp. 103-04 (David Knoll).

297 ICC Exhibit 20, pp. 1-2.

Recognizing that section 17.03 appears "out of step" with the remaining provisions of Article 17, counsel contended that, whereas those other provisions are general in nature, section 17.03 was included in the Framework Agreement for the very specific purpose of allowing non–Entitlement Bands, if they so chose, the opportunity to be treated in the same manner as Entitlement Bands with respect to both validation and settlement. Arguing that section 17.03 is "much more specific" than the remaining parts of Article 17, and relying on Supreme Court of Canada authority in the *Fort Frances v. Boise Cascade Canada Ltd.*[298] and *BG Checo v. B.C. Hydro*[299] cases, counsel urged that the Commission apply the common law principle that, where there is an inherent conflict between general language employed in one paragraph of an agreement and specific language employed in another paragraph of that agreement, the specific language must prevail. In short, counsel submitted that sections 17.01 and 17.02 of the Framework Agreement must be read as if they include the words "subject to section 17.03," with section 17.03 thereby being given precedence over those other provisions.

Canada's Position

From the outset, Canada has maintained that Kawacatoose has no basis for making a claim pursuant to Article 17 of the Framework Agreement. In taking that position, Canada has relied on common law contractual principles, as well as the particular terms of the Framework Agreement.

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298 *Fort Frances v. Boise Cascase Canada Ltd.* [1983] 1 SCR 171.

299 *BG Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 SCR 12.

Privity of Contract

Counsel for Canada submits that the Framework Agreement is an agreement among Canada, Saskatchewan, and the 26 Entitlement Bands. Since Kawacatoose is not an Entitlement Band and is therefore not a party to the Framework Agreement, it is not in a position to claim that Canada owes it a lawful obligation pursuant to that agreement. Counsel referred to the evidence of David Knoll as an admission that the issue of privity represents a "big problem" for Kawacatoose:[300]

> Q. Now how is it that these bands are supposed to take advantage of this, they're not parties to this agreement, if it was the intention to benefit all the other bands in Saskatchewan wouldn't there have been some special provision to be engaged in?
>
> A. And that's a good point, you know. You know, in the flurry of the negotiations and preparation of this, there wasn't much time to decide, you know, what would be the approach for other entitlement bands to take advantage of this. I mean we didn't even address, you know, how Cowessess – we knew that they were imminent – how they would be addressed. The focus was on the existing ones and we just didn't have the time to address how other Indian bands would be brought into this, whether they could sue as separate parties to enforce it, or what. I don't think any of the parties sat down and really addressed that, because it wasn't just Assembly of Entitlement and the F.S.I.N. negotiating team that was there, it was Canada and Saskatchewan. I don't believe any of us really addressed how that could be taken advantage of.[301]

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300 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 48.

301 ICC Transcript, May 24, 1995, pp. 124-25 (David Knoll).

In the closing oral submissions, counsel noted that privity of contract is a concept which protects not only parties to an agreement from having non-parties "opt in" to take advantage of those contractual terms, but also protects non-parties from having contractual terms imposed on them.

Counsel also referred the Commission to Article 10 and section 22.01 of the Framework Agreement, which state:

> **ARTICLE 10**
>
> **SUBSEQUENT ADHERENCE AND RATIFICATION OF BAND SPECIFIC AGREEMENTS. . . .**
>
> **10.02 ADHERENCE:**
>
> Any Entitlement Band whose Chief is not, as of the Execution Date [September 22, 1992], a signatory to this Agreement, may thereafter adhere to this Agreement and enter into a Band Specific Agreement in the manner contemplated by section 10.01, provided such Entitlement Band:
>
> (a) has obtained, by means of a Band Council Resolution, approval for execution and delivery of the Agreement by its Chief;
>
> (b) has caused its Chief to execute an Adherence Agreement in the form annexed as Appendix 2, and has delivered to Canada and Saskatchewan an original copy of such Adherence Agreement and the Band Council Resolution approving its execution and delivery, on or before March 1, 1993; and
>
> (c) has acknowledged, pursuant to its Band Council Resolution, that the Entitlement Monies to be received by the Entitlement Band do not exceed the amount set forth in

column 16 of Schedule 1, except as may otherwise have been agreed to in writing between such Entitlement Band, Canada and Saskatchewan. . . .

10.04 TIME FRAME FOR RATIFICATION, EXECUTION AND DELIVERY OF BAND SPECIFIC AGREEMENTS:

(a) The Entitlement Bands shall have three (3) years from the Execution Date to ratify, execute and deliver to Canada a Band Specific Agreement and Trust Agreement in accordance with the procedures herein contemplated, failing which all financial obligations hereunder, or between Saskatchewan and Canada, *inter se*, to continue to make payments in respect of any such Entitlement Band to the Treaty Land Entitlement (Saskatchewan) Fund shall immediately terminate.

(b) In such an event Canada and Saskatchewan shall be entitled to the return, of any funds which they have, respectively, paid to the Treaty Land Entitlement (Saskatchewan) Fund plus accrued interest thereon.

ARTICLE 22

COMING INTO FORCE

22.01 COMING INTO FORCE:

This Agreement shall come into force:

(a) as between an Entitlement Band, Saskatchewan and Canada, when a Band Specific Agreement respecting such Entitlement Band has been ratified, executed and delivered by an Entitlement Band, and executed by Canada, within the time frames and in accordance with the provisions of Article 10; and

(b) as between Saskatchewan and Canada, on the Execution Date.

Article 10 and section 22.01 require even Entitlement Bands to adhere to the Framework Agreement and to ratify, execute, and deliver Band Specific Agreements before the Framework Agreement comes into force with respect to those bands. Noting that one Entitlement Band did not adhere to the Framework Agreement and two more never negotiated and executed Band Specific Agreements, counsel contended that those Entitlement Bands cannot claim any substantive rights against Canada and Saskatchewan unless those steps occur, and that non–Entitlement Bands should not be placed in a better position than Entitlement Bands, which are actually parties to the Framework Agreement.[302]

Counsel also considered that the Framework Agreement's enurement clause gives contractual expression to the concept of privity by limiting the benefit and binding effect of the agreement to the parties. That provision states:

20.01 ENUREMENT:

This Agreement shall enure to the benefit of and be binding upon Canada and Saskatchewan, and their respective heirs, successors

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[302] Ian D. Gray, Counsel, Legal Services, Specific Claims West, to Ron Maurice, Indian Claims Commission, September 12, 1994, p. 2 (ICC file 2107-15-1).

> and assigns and, subject to the provisions of Article 22, upon the Entitlement Bands, their respective Members, and each of their respective heirs, successors, legal representatives and permitted assigns. . . .

Sections 17.01 and 17.02 of the Framework Agreement

Counsel for Canada contended that the parties to the Framework Agreement did not merely rely on basic legal principles, such as privity of contract, to confirm that only Entitlement Bands could benefit from the Framework Agreement. They were also explicit in dealing with the rights of other First Nations in sections 17.01 and 17.02 of the Framework Agreement. For ease of reference, those provisions are reproduced below:

> **17.01 NO PREJUDICE:**
>
> Nothing in this Agreement shall be interpreted in a manner so as to prejudice:
>
> (a) the rights or obligations of Canada in respect of any Indian band not a party to this Agreement; or
>
> (b) the rights of any Indian band not party to this Agreement;
>
> including, without limitation, any Indian band in respect of which Canada may hereafter accept for negotiation a claim for treaty land entitlement.
>
> **17.02 NO CREATION OF RIGHTS:**
>
> Nothing in this Agreement shall be interpreted in a manner so as to create or expand upon rights or confer any rights upon, or to the benefit of, any Indian band not a party to this Agreement.

Counsel submits that section 17.02 clearly applies to Kawacatoose because Kawacatoose is not a party to the Framework Agreement. In addition, counsel underscored the testimony of David Knoll, who was forced to concede that section 17.02 contains nothing that limits its applicability to riparian or other specific rights.[303] Counsel concluded:

> The parties to the Framework Agreement were not content to merely state [in section 17.02] that other First Nations do not gain any rights by the agreement, they went further and stated the reverse of the same idea [in section 17.01]. . . .
>
> Obviously, if signing the Framework Agreement mandated how Canada must proceed in accepting for negotiation the claims of other First Nations, then the Framework Agreement would prejudice Canada's rights vis-a-vis an "Indian band not party to this Agreement." This is contrary to the intentions of Canada, Saskatchewan and the signatory First Nations as clearly expressed in section 17.01.[304]

James Kerby testified that the intention behind these provisions was to ensure that the relationship of Canada with non–Entitlement Bands would not change:

> . . . 17.01 in my opinion is intended to indicate that nothing in the remainder of the Framework Agreement is intended to prejudice either the [213] rights or obligations that Canada has to anyone – any band that is not a party to this agreement, and also the remainder of the agreement was not intended to prejudice the rights of any Indian band who was not a party to this agreement. And it went on to indicate "including, without limitation, a band in respect of which there was an acceptance for negotiation of Treaty Land Entitlement." So that clause, when coupled with 17.02, which is there to state there was no creation of rights for other bands, was in my mind intended to maintain the status quo. No more than

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303 ICC Transcript, May 24, 1995, p. 128 (David Knoll).

304 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 49.

> the parties could, for example, no more than the parties could have entered into an agreement here that would have said other Indian bands in Saskatchewan had to settle on the same basis as this agreement, they were confirming that, in fact, there was no effect on either Canada or Saskatchewan or other Indian bands as a result of this agreement having been entered into with these parties.[305]

In the course of oral submissions, counsel also relied on certain of the principles of contractual interpretation raised in the submissions of counsel for Kawacatoose. Arguing that an average person would consider the natural and ordinary meaning of the words in sections 17.01 and 17.02 to convey that the Framework Agreement is to confer no rights on non-Entitlement Bands, counsel submitted that giving section 17.03 the meaning urged by Kawacatoose would result in the words "Nothing in this Agreement" in sections 17.01 and 17.02 being rendered superfluous.

Section 17.03 of the Framework Agreement

Canada's position with regard to section 17.03 of the Framework Agreement is that, since it states that "Canada and Saskatchewan acknowledge" and "Canada and Saskatchewan shall support," it is merely intended to create rights between the two levels of government. As Mr. Kerby noted, several provisions of the Framework Agreement represent agreements between just two of the parties, some being between Canada and Saskatchewan, and others between one of those levels of government and the Entitlement Bands.[306] He testified:

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305 ICC Transcript, May 25, 1995, pp. 212-13 (James Kerby).

306 ICC Transcript, May 25, 1995, pp. 225-26 (James Kerby).

> Well if you will recall that my view is that the clause has been put in as an agreement between Canada and Saskatchewan and that, by implication, then, Canada and Saskatchewan were indicating that they were prepared, as between each other, to extend the principles in a way which would ensure that everyone involved, Canada and Saskatchewan, the local governments, that the other bands would be dealt with in a fair and equitable manner. But knowing full well that the parties may or may not agree to proceed down that road.[307]

Counsel further contends that the parties did not intend section 17.03 to take precedence over sections 17.01 and 17.02 or they would have inserted wording like "Notwithstanding sections 17.01 and 17.02" in section 17.03. The more appropriate conclusion, says counsel, is that sections 17.01 and 17.02 should be given precedence over section 17.03.

With respect to the interpretation to be given to section 17.03, Canada's submissions emphasize that the language employed in that section amounts to something less than a strict contractual promise to act:

> It [section 17.03] says acknowledge, and that doesn't mean agree. Acknowledge is something less [than] agree. Acknowledge is something that governments would do, would say to each [other]. They would – it's something a little less formal than agree, because that's how governments would do business. It's more of a political sort of arrangement that we can use on Saskatchewan, and Saskatchewan can use on us. It's acknowledge. . . .
>
> And then going down to the fifth line in 17.03 it says Canada -- Canada and Saskatchewan shall support an extension of. That doesn't

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307 ICC Transcript, May 25, 1995, p. 231 (James Kerby).

> mean Canada is indelibly bound to extend the principle. . . . We mean shall support an extension, that's – it's something less than will extend.[308]

Similarly, Mr. Kerby commented on the phrase "Canada and Saskatchewan will support an extension of the principles of this Agreement":

> Well as I indicated, I believe that that is – from a legal perspective is a softer statement than you might find if it were to say the parties have "agreed" that they will do "X." So there's been an acknowledgement, the parties will support an extension of the principles. You'll note it doesn't say that the parties will enter into a duplicate version of this agreement; it could have said that but it doesn't say that, it says they will support an extension of the principles of this agreement and the Amended Cost Sharing Agreement. . . .
>
> I think if you take it from the premise that I start from here, that this is primarily intended as an obligation as between Canada and Saskatchewan and not other parties or – certainly not other parties and not even the entitlement bands. That there was some recognition that depending on when resolution of outstanding Treaty Land Entitlement might occur that a number of the provisions of this agreement and, in particular, the Amended Cost Sharing Agreement, might not fit anymore. . . .
>
> So the parties, I think were saying, were trying to hook each other as best they could but knowing that you could not expect to simply take those two agreements and two or three or four or five or seven years down the road and superimpose them on a new situation verbatim, it wouldn't work.[309]

Counsel argues that section 17.03 does not require Canada to substantiate a claim on the same or substantially the same basis as the Entitlement Bands; rather, it

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308 ICC Transcript, October 24, 1995, pp. 198-200 (Ian Gray).

309 ICC Transcript, May 25, 1995, pp. 223-25 (James Kerby).

states that, in the event that such a claim is substantiated, Canada and Saskatchewan will support an extension of the Framework Agreement and the Amended Cost Sharing Agreement to the First Nation whose claim is substantiated. Whether substantiation has taken place or not is to be determined by Canada:

> The second line [of section 17.03] uses the word determined by Canada, determined by Canada [sic]. What would the average person understand. What's the ordinary natural meaning. It's up to Canada to accept or reject a claim that a band comes forward with. We have rejected this claim. We have determined that there is no TLE claim here.[310]

Counsel submits that section 17.03 speaks only to settlement following validation, and not to the standards to be used in substantiating a claim from a non–Entitlement Band, since the parties did not intend the section to be used in the manner asserted by counsel for Kawacatoose. Dr. Lloyd Barber, as lead negotiator of the Framework Agreement on behalf of the FSIN and Entitlement Bands, believed that, since the Entitlement Bands had already been validated, the agreement "was not about the process of validation." Moreover, he was unaware of the criteria that had been used to validate the claims of the Entitlement Bands. In counsel's view, his testimony is good evidence that the parties were not intending to establish criteria for future validations in section 17.03.

With regard to the phrase "the same or substantially the same basis," counsel for Canada maintains that there is no common set of criteria on which the Entitlement Bands were validated, contrary to what was alleged by counsel for Kawacatoose. The 1983 ONC Guidelines represent just one possible set of criteria in the evolutionary

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310 ICC Transcript, October 24, 1995, p. 199 (Ian Gray).

development of the treaty land entitlement process, and indeed were not even in existence when most of the 26 Framework Bands were validated. "Accordingly," says counsel, "even if Canada were obliged to accept the TLE claim of the [Kawacatoose First Nation] on the 'same or substantially the same' basis as those of the other Framework Bands, the [Kawacatoose First Nation] has not shown what that criteria [sic] would be, much less that it would necessarily result in a TLE claim that would be accepted for negotiation."[311]

Analysis

Validation

Based on our review of the foregoing submissions by counsel for both parties to this inquiry, we have come to the conclusion that Canada does not owe a lawful obligation arising from section 17.03 of the Framework Agreement to validate the Kawacatoose claim.

Counsel for Kawacatoose submitted that Canada owes a fiduciary obligation to Kawacatoose, based on the following passage from the Supreme Court of Canada decision in *Sparrow:*

> In our opinion, *Guerin* [*v. The Queen*, [1984] 2 S.C.R. 335, 55 N.R. 161, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120], together with *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s. 35(1) [of the *Constitution Act, 1982*]. That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and

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311 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 53.

> contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[312]

Counsel then contended that the nature of Canada's fiduciary duty in the present case, and the manner in which it crystallized into specific obligations to Kawacatoose, are given shape by the reasons of Dickson J (Beetz, Chouinard, and Lamer JJ concurring) and Wilson J (Ritchie and McIntyre JJ concurring) in the *Guerin* case. In *Guerin* the Musqueam Band surrendered 162 acres of reserve land to the Crown in 1957 for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The surrender document, which was subsequently executed, gave the land to the Crown "in trust to lease the same" upon such terms as it deemed most conducive to the welfare of the Band. In fact the terms of the lease obtained by the Crown were significantly different from what the Band had agreed to and were less favourable.

All eight members of the Court sitting on the decision found that Canada had breached its duty to the Band. Dickson J stated:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal

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312 *R. v. Sparrow*, [1990] 2 CNLR 160 at 180.

positions are such tht one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:

> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I make no comment upon whether this descripton is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct. . . .

The trial judge found that the Crown's agents promised the band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms. The lease obtained was much less valuable. As already mentioned, the surrender document did not make reference to the "oral" terms. I would not wish to say that those terms had nonetheless somehow been incorporated as conditions into the surrender. They were not formally assented to by a majority of the electors of the band, nor were they accepted by the Governor in Council, as required by s. 39(1)(b) and (c). . . .

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have

> returned to the band to explain what had occurred and seek the band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.[313]

While Dickson J concluded that the fiduciary obligation owed by Canada to the Musqueam Band, although trustlike, did not actually constitute a trust, Wilson J held that the fiduciary duty owed to the band prior to the surrender being given was transformed by the surrender into a specific trust duty to lease the land to the golf club on the terms approved by the band:

> It was submitted on behalf of the Crown that even if the surrender gave rise to a trust between the Crown and the band, the terms of the trust must be found in the surrender document and it was silent both as to the lessee and the terms of the lease. Indeed, it expressly gave the government complete discretion both as to the lessee and the terms of the lease and contained a ratification by the band of any lease the government might enter into.
>
> I cannot accept the Crown's submission. The Crown was well aware that the terms of the lease were important to the band. Indeed, we have the trial judge's finding that the band would not have surrendered the land for the purposes of a lease on the terms obtained by the Crown. It ill becomes the Crown, therefore, to obtain a surrender of the band's interest for lease on terms voted on and approved by the band members at a meeting specially called for the purpose and then assert an overriding discretion to ignore those terms at will: see *Robertson* v. *Min. of Pensions*, [1949] 1 K.B. 227, [1948] 2 All E.R. 767; *Lever Fin. Ltd.* v. *Westminster (City) London Borough Council*, [1971] 1 Q.B. 222, [1970] 3 W.L.R. 732, [1970] 3 All E.R. 496 (C.A.). It makes a mockery of the band's participation. The Crown well knew that the lease it made with the

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313 *Guerin* v. *The Queen*, [1984] 2 SCR 335 at 383-84 and 388-89, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120, per Dickson J, at 136-37 and 140 (CNLR).

> golf club was not the lease the band had surrendered its interest to get. Equity will not permit the Crown in such circumstances to hide behind the language of its own document.
>
> I return to s. 18. What effect does the surrender of the 162 acres to the Crown in trust for lease on specific terms have on the Crown's fiduciary duty under the section? It seems to me that s. 18 presents no barrier to a finding that the Crown became a full-blown trustee by virtue of the surrender. The surrender prevails over the s. 18 duty but in this case there is no incompatibility between them. Rather the fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the band crystallized upon the surrender into an express trust of specific land for a specific purpose. . . .
>
> What then should the Crown have done when the golf club refused to enter into a lease on the approved terms? It seems to me that it should have returned to the band and told them. It was certainly not open to it at that point of time to go ahead with the less favourable lease on the basis that the Governor in Council considered it for the benefit of the band. The Governor in Council's discretion in that regard was pre-empted by the surrender. I think the learned trial judge was right in finding that the Crown acted in breach of trust when it barrelled ahead with a lease on terms which, according to the learned trial judge, were wholly unacceptable to its *cestui que trust*.[314]

The facts before the Commission in this inquiry do not reveal the same sort of proximity that gave rise to the breach of fiduciary obligation in the *Guerin* case. Whereas the Crown in *Guerin* obtained a surrender of the Musqueam Band's land based on certain understandings and undertakings given specifically and directly to that Band by Canada's representatives, we find that the same cannot be said of the relationship and representations, if any, between Canada and Kawacatoose as embodied in the Framework Agreement. There appears to have been no intention on

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314 *Guerin* v. *The Queen*, [1984] 2 SCR 335 at 354-55, [1985] 1 CNLR 120 at 155-56.

the part of Canada to contract with, or indeed to make representations to, any First Nations except the Entitlement Bands, nor has there been any act by Kawacatoose in reliance upon undertakings or representations which parallels the surrender given by the Musqueam Band. Subject to certain reservations, which we will discuss below, we view the general intent of the Framework Agreement to be the settlement of outstanding treaty land entitlement claims between the two levels of government and the Entitlement Bands without impacting the relationship of Canada and the remaining Saskatchewan First Nations. We have no doubt that the relationship between Canada and Kawacatoose is fiduciary in nature as set forth in *Sparrow*, but we do not see how the act of contracting with the Entitlement Bands has elevated or "crystallized" that fiduciary relationship into a trust or trustlike obligation.

For similar reasons, we cannot conclude that the "representations" in section 17.03 of the Framework Agreement amount to a contractual offer which is open for acceptance by Kawacatoose within the terms of the classic unilateral contract formula. We do not view section 17.03 as comprising representations to the non–Entitlement Bands regarding validation at all, much less an offer which can be accepted by the act of substantiating an outstanding treaty land entitlement claim on "the same or substantially the same basis as the Entitlement Bands." Nor do we consider the facts of this case to support a claim that Canada should be estopped from denying that the First Nation's treaty land entitlement claim should be validated. We simply do not find in the words of section 17.03 the requisite intention that Canada should be bound in this fashion. We view validation as triggering the operation of section 17.03, with that provision then focusing on the terms of settlement to be extended to non–Entitlement Bands *following* validation.

Settlement

In assessing the effect of section 17.03 on non–Entitlement Bands like Kawacatoose, the first question we must resolve is how section 17.03 is to be interpreted within the context of the remainder of Article 17 and the Framework Agreement. We will then address the issue of whether section 17.03 imposes an enforceable obligation upon Canada once a non–Entitlement Band has substantiated a treaty land entitlement claim on the same or substantially the same basis as an Entitlement Band.

We agree with the principles of treaty and contractual interpretation set forth in the First Nation's submission, and we also agree that the Framework Agreement constitutes a "land claims agreement" within the meaning given that term in section 35(3) of the *Constitution Act, 1982*. Nevertheless, we find that the "treaty rights" within the Framework Agreement which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982,* are the rights reserved to the Entitlement Bands by that agreement. Moreover, while the Commission might be prepared in ordinary circumstances involving treaty interpretation to extend to terms which are ambiguous or at least difficult to interpret a "fair, large and liberal construction in favour of the Indians," in accordance with the various authorities proffered by counsel for Kawacatoose, we find that our scope for doing so in the context of the Framework Agreement is limited. Unlike Treaty 4, the Framework Agreement is not a document that was presented in the form of an ultimatum to Indians who were unable to read it, let alone to seek independent advice regarding its effects and impact on them. All three of the witnesses presented before the Commission to give evidence in relation to the genesis of the Framework Agreement testified that the agreement was the product of two years of intense and hard-fought bargaining by parties supported by well-trained and skilled representatives. Concessions were sought and won by all sides in those

negotiations; in light of these circumstances, it is impossible to conclude that the difference in the relative negotiating strengths of the parties led to one of those parties being forced into an improvident bargain. We find support in this conclusion in the terms of section 20.15 of the Framework Agreement, which was noted by James Kerby in his testimony:

> **20.15 AMBIGUITIES:**
>
> There shall be no presumption that any ambiguity in this Agreement should be interpreted in favour of or against the interests of any of the parties.

Having regard for the principles of treaty interpretation raised by counsel for Kawacatoose, we view section 20.15 as a signficant concession obtained on behalf of Canada and Saskatchewan. Although Kawacatoose is not a party to the Framework Agreement and is arguably not bound by section 20.15, we have nevertheless concluded that, in light of the context in which the Framework Agreement was negotiated, that agreement must be construed in accordance with the usual principles of contractual interpretation, but without reliance on any rules of treaty interpretation which would otherwise bestow the "benefit of the doubt" in favour of a First Nation.

Counsel for Canada argued that, because Kawacatoose is not a party to the Framework Agreement, section 17.02 applies to the First Nation because that provision relates to "any Indian band not a party to this Agreement." There is a difference, however, between saying that section 17.02 *applies* to Kawacatoose and saying that it *binds* Kawacatoose. In the view of the Commission, Kawacatoose clearly is not bound by section 17.02, although it might be said that section 17.02 applies to it. For Canada to say that section 17.02 is binding upon Kawacatoose would be to deny the

privity of contract arguments so carefully crafted by Canada's own counsel. But, while Canada is precluded by principles of privity from claiming that Kawacatoose is bound by section 17.02, Kawacatoose is likewise prevented by those same principles from claiming that it is bound by and can claim any benefit from section 17.03.

Nevertheless, can it be argued by the First Nation that section 17.03 applies to it? The answer to this question lies to a certain extent in the meaning of section 17.02. That section states that nothing in the Framework Agreement "shall be interpreted in a manner so as to create or expand upon rights or confer any rights upon, or to the benefit of, any Indian band not a party to this Agreement." The question, then, is whether section 17.03 creates or expands upon rights or confers any rights upon, or to the benefit of, Kawacatoose, or, more particularly, whether the rights being claimed by Kawacatoose pursuant to section 17.03 represent new rights or an expansion of existing rights which it already possesses. If so, then, unless section 17.03 is considered to take precedence over section 17.02, section 17.02 would render section 17.03 inapplicable to a non–Entitlement Band. On the other hand, if section 17.03 does not create or expand rights or confer rights upon or to the benefit of Kawacatoose, then it can be said that section 17.03 applies to the First Nation since, in the words of section 17.01, Canada's rights and obligations vis-à-vis Kawacatoose would not be prejudiced by the operation of section 17.03.

Does section 17.03 create or expand upon rights or confer any rights upon, or to the benefit of, Kawacatoose? Moreover, what is the application of section 17.03 to Kawacatoose as a non–Entitlement Band? To answer these questions, we turn now to a closer scrutiny of section 17.03.

We must say at the outset that we disagree with the characterization of section 17.03 by Mr. Kerby and counsel for Canada as merely an agreement between Canada

and Saskatchewan. It is true that section 17.03 commences with the words "Canada and Saskatchewan acknowledge," but it is not necessarily to be inferred that those words mean that Canada and Saskatchewan acknowledge to each other alone. While we agree with Mr. Kerby that certain provisions of the Framework Agreement constitute bilateral agreements between two of the parties to the agreement, we do not agree that section 17.03 is one of those provisions. For example, section 14.01 and subsections 14.02(a) and (b) state that "Canada agrees *with* the Entitlement Bands" or "[t]he Entitlement Bands agree *with* Canada," whereas section 17.03 states that "Canada and Saskatchewan acknowledge." Their acknowledgment is undoubtedly to each other, but there is nothing in these words to suggest that the acknowledgment does not also extend to the Entitlement Bands. By way of parallel, we note the wording of section 16.02 of the Framework Agreement:

> **16.02 RELEASE BY CANADA AND ENTITLEMENT BANDS:**
>
> (a) Canada and each of the Entitlement Bands hereby agree that, after ratification, execution and delivery of a Band Specific Agreement, as long as Saskatchewan is paying to Canada and the Treaty Land Entitlement (Saskatchewan) Fund the amounts required to be paid by Saskatchewan in respect of each of the said Entitlement Bands in accordance with this Agreement, and Saskatchewan has not failed, in any material way, to comply with its other obligations hereunder:
>
> (i) the Superintendent General of Indian Affairs shall not request Saskatchewan to set aside any land pursuant to paragraph 10 of the *Natural Resources Transfer Agreement* to fulfil Canada's obligations under the Treaties in respect of that Entitlement Band; and

(ii) the Entitlement Band shall not make any claim whatsoever that Saskatchewan has any obligation to provide land pursuant to paragraph 10 of the *Natural Resources Transfer Agreement*.

Section 16.02 begins with the words "Canada and each of the Entitlement Bands agree," but we would find it difficult to suggest that that provision, which purports to release Saskatchewan from certain obligations under the Natural Resources Transfer Agreement of 1930, would not be enforceable by Saskatchewan. Nevertheless, this still does not make section 17.03 enforceable by Kawacatoose. Kawacatoose is not a party to the Framework Agreement and cannot be considered to be an intended "recipient" of the acknowledgment given by Canada and Saskatchewan. We will return to the question of enforceability later in this report. At this point, the principle to be derived from the analysis is that section 17.03 is not simply a bilateral agreement between Canada and Saskatchewan.

The next key words of the section are "in the event that it is hereafter determined by Canada." Counsel for Canada contends that the ordinary, natural meaning of the words "determined by Canada" is that "[i]t's up to Canada to accept or reject a claim that a band comes forward with." This construction imports an element of discretion to be exercised by Canada, which it is not obvious to us the words were intended to bear. We do not view the words "determined by Canada" as giving Canada the freedom to arbitrarily decide whether a claim is to be accepted or rejected. We prefer the more objective interpretation of "determines" in the sense that, once Canada "discovers" or "understands" rather than "decides" that a non–Entitlement Band has substantiated a claim, then the remaining provisions of section 17.03 become operative.

Alternatively, if "determines" means "decides" in the subjective sense suggested by counsel for Canada, we believe that Canada's fiduciary obligation to Indians in general and to Kawacatoose in particular would still preclude it from making such a decision arbitrarily or capriciously. Instead, the decision would have to be made in a manner that is fair and in the best interests of the First Nation involved. This is not to say that we endorse the submission by counsel for Kawacatoose that section 17.03 embodies promises to the First Nation which, once given, narrow Canada's discretion and crystallize into specific obligations from which Canada cannot depart without the First Nation's consent. We do not. Rather, what we are saying is merely that Canada's decision-making process in relation to the determination required by section 17.03 must be exercised fairly and in good faith.

The subsequent words in section 17.03 are "that other Bands (other than any Entitlement Band) have substantiated an outstanding treaty land entitlement, on the same or substantially the same basis as the Entitlement Bands." The parties agree, and we concur, that Kawacatoose is an "other Band" within the meaning of this phrase. The real issue is whether Kawacatoose has substantiated an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands. Counsel for Kawacatoose says yes and relies on the 1983 ONC Guidelines as comprising the criteria which, if applied to each of the Entitlement Bands, would result in a validation in every case. Counsel for Canada says no because there is no single set of criteria to which Kawacatoose can point as forming the sole standard pursuant to which all of the Entitlement Bands were validated; validation for most of the 26 Entitlement Bands predated the 1983 ONC Guidelines.

We find that there is a standard in section 17.03 and that standard is, quite simply, "the same or substantially the same basis as the Entitlement Bands." It is not

necessary to have a document such as the 1983 ONC Guidelines in existence to establish that the Kawacatoose claim has been made on exactly the same basis as bands such as Poundmaker, Sweetgrass, Pelican Lake, and Onion Lake. All those First Nations were validated on the basis of late additions, notwithstanding the fact that they received sufficient land to account for their entire populations at the time their reserves were first surveyed. That Dr. Barber was unaware of the criteria under which the 26 Entitlement Bands had been validated when he was negotiating the Framework Agreement does not impute a conclusion that the FSIN and Entitlement Bands were not concerned with standards of validation. Section 17.03 has been clearly worded to state that the same or substantially the same standards will apply.

At the same time, we believe that the significance of the 1983 ONC Guidelines to the Kawacatoose claim has been overstated by counsel for Kawacatoose. We agree with Mr. Westland's view that the 1983 ONC Guidelines are less important than establishing the true extent of Canada's lawful obligation, and that the lawful obligation stems from Treaty 4. Where we part company with Mr. Westland is in his opinion that the "fundamentals" of Canada's lawful obligation do not extend beyond a First Nation's date-of-first-survey population plus absentees and arrears. Our conclusion in relation to the second issue in this inquiry is that Canada's lawful obligation also includes "late additions" such as new adherents to treaty, transfers from landless bands, and, to the extent that they are new adherents or landless transfers in their own right, in-marrying treaty Indian women. On this basis, we decided that, although the size of the reserve originally surveyed for Kawacatoose satisfied its date-of-first-survey population plus absentees and arrears, Canada still owes a lawful obligation to Kawacatoose for outstanding treaty land entitlement as a result of these late additions to the First Nation's DOFS population. We also consider that several of the Entitlement

Bands established their claims to outstanding treaty land entitlement on the basis of late additions, and that claims established on this basis fall within the scope of Treaty 4. We therefore conclude that Kawacatoose has substantiated its claim for treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which is the basis prescribed by treaty.

We do not view Canada's obligation in this regard as having been conferred upon Kawacatoose or created or expanded by the operation of any provision of the Framework Agreement. These rights have existed since the execution of Treaty 4 by Kawacatoose in 1874. Where the First Nation's rights could be said to have been created or expanded is if Kawacatoose had substantiated a claim on the same or substantially the same basis as an Entitlement Band, which may have been validated for reasons other than those arising pursuant to Treaty 4. In that event, Kawacatoose would have to be viewed as having substantiated a claim for outstanding treaty land entitlement by virtue of the Framework Agreement alone, and not by virtue of its pre-existing rights under treaty. In such circumstances, Kawacatoose's claim would be precluded by the operation of section 17.02.

For example, had we concluded that Canada's position with regard to the "fundamentals" of lawful obligation was correct and that Treaty 4 confers treaty land entitlement rights on a First Nation's DOFS population plus absentees and arrears only, then a claim by Kawacatoose based entirely on late additions could only be justified on the basis that there are, by the First Nation's count, seven bands that were likewise validated on the basis of late additions. Kawacatoose could assert substantiation of its claim on the same or substantially the same basis as those seven bands, but it could not show that it had a pre-existing right pursuant to Treaty 4. We would have been forced

in those circumstances to conclude that substantiation on this contractual basis would have constituted the creation or expansion of rights to the benefit of Kawacatoose.

In summary, we wish to emphasize that a First Nation's substantiation of its treaty land entitlement claim on the same or substantially the same basis as the Entitlement Bands does not impose on Canada – by fiduciary, contractual, or other means – a lawful obligation to validate a non–Entitlement Band if that basis goes beyond Canada's lawful obligation under Treaty 4. We do not view the suggestion that Canada has gone beyond its lawful obligation in previous validations or settlements as creating new "high water marks" to which, as a minimum, all future validations and settlements must conform, failing which Canada is in breach of its fiduciary obligations to non–Entitlement Bands. The proper basis for validation contemplated by section 17.03 is the basis required by Treaty 4.

The next important phrase in section 17.03 of the Framework Agreement is "Canada and Saskatchewan shall support an extension of the principles of this Agreement and the Amended Cost Sharing Agreement in order to fulfill the outstanding Treaty land entitlement obligations in respect of such Bands." We note the use of the word "shall" in this phrase, which normally implies a mandatory obligation on the part of the party or parties to whom it applies. However, when used in connection with the word "support," we see the obligation imposed on Canada and Saskatchewan as amounting to no more than what is referred to in common law contractual terms as an agreement to agree or perhaps a mere obligation to negotiate. In most contractual circumstances, such an obligation would be viewed as unenforceable by the parties to the agreement, let alone a non–Entitlement Band such as Kawacatoose. Even in the present case, assuming validation of a non–Entitlement Band has occurred on the same or substantially the same basis as the Entitlement Bands, there is no binding obligation

on Canada and Saskatchewan to actually enter into an agreement with a non–Entitlement Band on precisely the same terms as those set forth in the Framework Agreement in relation to the Entitlement Bands. Nevertheless, once validation has occurred, we read section 17.03 to mean that Canada and Saskatchewan will at least negotiate towards a settlement of the non–Entitlement Band's outstanding treaty land entitlement on the basis of the Framework Agreement. We agree with the following statement by Mr. Knoll:

> I think the entitlement bands having included it [section 17.03] in there, anticipated that this would be a benefit to the other Indian bands who may be able to benefit from this, even though they weren't a party to the Framework Agreement. They would be the only ones that could benefit, I gather, from this particular clause.[315]

The obligation in section 17.03, coupled with Canada's fiduciary obligation to act fairly and in the best interests of all bands, and assuming that section 17.02 does not dictate otherwise, would compel Canada to negotiate in good faith and to insist upon Saskatchewan doing the same. Provided that the parties were to negotiate in good faith, the obligations of Canada and Saskatchewan pursuant to section 17.03 would be satisfied, even if the parties were ultimately to fail to arrive at a negotiated settlement.

We now return to the question of whether the parties intended section 17.03 to be operative in relation to non–Entitlement Bands, notwithstanding the fact that those bands were not made parties to the Framework Agreement. In considering this point, we have had close regard for certain statements made by Mr. Kerby and counsel for Canada. As referred to earlier, Mr. Kerby (who, it will be recalled, acted as Canada's

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315 ICC Transcript, May 24, 1994, p. 111 (David Knoll).

solicitor in the negotiation of the Framework Agreement) stated with respect to the non–Entitlement Bands:

> They would fall into 17.03 by reference providing they had substantiated an outstanding Treaty Land Entitlement claim on the same or substantially the same basis, that's how they fall into 17.03. So they had to get over the hurdle of substantiating their claim, but then, yes, 17.03 would apply.[316]

In making this statement, Mr. Kerby acknowledged that section 17.03 should be regarded as applying to non–Entitlement Bands, such as Kawacatoose, once those bands have established a claim on the same or substantially the same basis as an Entitlement Band.

Similarly, during the first day of the inquiry at the community session, in the course of objecting to the Commission's consideration of the Framework Agreement in these proceedings, counsel for Canada entered into the following exchange with Commissioner Prentice:

> COMMISSIONER PRENTICE: Are you saying it doesn't mean that if another T.L.E. is validated that Canada and Saskatchewan would or would not have to give that band the same deal that these bands received?
>
> MR. GRAY: If Canada validates a claim based on the [DOFS] theory and the pay lists analysis, then Saskatchewan is bound to apply the same Framework Agreement and Amended Cost Sharing Agreements as they have done with the other Framework Bands.
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> COMMISSIONER PRENTICE: So that the band would be entitled to the same level of compensation?

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316 ICC Transcript, May 25, 1995, p. 230 (James Kerby).

MR. GRAY: Yeah, but – yeah, once that's happened then it's really so Canada can go after Saskatchewan to make sure that they don't back out of their commitment once we've gone through the process of validating the claim.

For example, if we were to validate Kawacatoose after the inquiry, say, okay, yes, okay, now we validate your claim; we don't want to go to Saskatchewan and have them say, sorry, we're not – we're not prepared to proceed on the 70–30 cost share, for example, and we're not prepared to extend other benefits of the Framework Agreement. We can then go after them with 17.03 and say, listen, you've promised us that you would, once we've validated on the same basis, you promised us you would extend the same benefits. It's for Canada to go after Saskatchewan to ensure that they live up to their obligations should we validate future claims. In any event, that's what we say 17.03 is there for, but there's still no privity for another band to use that clause and 17.02 makes that clear, as does 17.01.

COMMISSIONER PRENTICE: But it must surely create an expectation on the part of a band that they are going to receive the same treatment, equitable treatment as compared to these 26 Framework Agreement Bands?

MR. GRAY: Yes, once it's been validated by Canada and the claim hasn't been rejected, but validated, I think they could then come to Canada and say, well listen, Canada, you got that promise from Saskatchewan, now let's see you live up to that and let's see you go after Saskatchewan to make sure that they come to the table at the end of the day.[317]

Assuming that the band referred to by counsel for Canada would be able to require Canada to ensure that Saskatchewan lived up to its promises, we find it difficult to understand why that same band could not require Saskatchewan to do the same in relation to promises made by Canada, or alternatively why the band could not use the

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317 ICC Transcript, November 15, 1994, pp. 162-63 (Ian Gray).

identical mechanism to ask Canada directly to "live up to" its own promises under the Framework Agreement.

To date, Canada has not acknowledged that it owes any sort of lawful obligation to validate Kawacatoose at all, much less that, following validation, settlement should be predicated on the formula established by the Framework Agreement. We expect that, assuming Canada will now be satisfied that the Kawacatoose claim has been substantiated on the same or substantially the same basis as the Entitlement Bands, Canada will consider itself honour-bound to extend the Framework Agreement's principles of settlement to Kawacatoose. We draw this conclusion from the tone of the preliminary objection by Canada to the Commission's consideration of the third issue in this inquiry:

> If it was just a matter of the niceties of contract law, we would probably have no objections to having this matter looked at by the Commission. *However, Canada views allegations that it is not living up to its Framework Agreement obligations very seriously. We view the Framework Agreement as a major achievement for Canada, Entitlement Bands and Saskatchewan. Canada is spending a great amount of resources in implementing the agreement. Canada has attempted to scrupulously live up to its obligations to date under the Framework Agreement* and cannot passively allow these types of allegations to be carried forward before the Commission.
>
> We believe that if the Commission were to focus on this allegation, it would tend to prejudice Canada's ability to have a fair hearing before the Commission. *The mere allegation that Canada would ignore the Framework Agreement so soon after its signing would cast Canada in an unfavourable light at the inquiry* – even if the allegation itself is baseless. In other words, the prejudicial nature of this allegation far outweighs its relevance to the question at hand, namely whether Canada owes a lawful

> obligation to the Kawacatoose First Nation with respect to treaty land entitlement.[318]

In conclusion, we find that the signatories to the Framework Agreement intended section 17.03 to apply to the settlement of treaty land entitlement claims of non–Entitlement Bands subsequently validated on the same or substantially the same basis as the Entitlement Bands. Kawacatoose is one such band, and we believe that section 17.03 should apply to it.

Still, having established the meaning of section 17.03 and its applicability to non–Entitlement Bands like Kawacatoose, two questions remain: whether that provision is overridden by section 17.02 and, if not, whether section 17.03 is enforceable by Kawacatoose.

Counsel for Kawacatoose submits that to apply section 17.02 in a fashion that prevents section 17.03 from imposing a substantive obligation on Canada and Saskatchewan would render the validation of Kawacatoose "on the same or substantially the same basis as the Entitlement Bands" meaningless. In contrast, counsel for Canada urges the Commission to find that giving section 17.03 the meaning requested by Kawacatoose would likewise preclude any signficance being given to the words "Nothing in this Agreement" at the outset of each of sections 17.01 and 17.02. If only one of these submissions can be correct, we are left with the difficult task of establishing whether section 17.03 or alternatively section 17.02 takes precedence.

As a preliminary point, we believe that, instead of (or perhaps in addition to) the words "on the same or substantially the same basis as the Entitlement Bands," the

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318 Ian D. Gray, Counsel, Legal Services, Specific Claims West, to Ron Maurice, Indian Claims Commission, September 12, 1994 (ICC file 2107-15-1). Emphasis added.

provision in section 17.03 which conflicts with section 17.02 is the phrase "Canada and Saskatchewan shall support an extension of the principles of this Agreement and the Amended Cost Sharing Agreement in order to fulfill the outstanding Treaty land entitlement obligations in respect of such Bands." This latter phrase relates to the terms of settlement rather than the question of validation, which arises out of the treaty rather than the Framework Agreement, as we have already canvassed. If it can be shown that the Framework Agreement affords new or expanded settlement rights and benefits to validated non–Entitlement Bands, then at first blush section 17.02 would appear to prevent those bands from receiving and enjoying those rights and benefits.

In reconciling these clauses, we have had regard for the following reasons of La Forest and McLachlin JJ in *BG Checo International Limited v. British Columbia Hydro and Power Authority*:

> It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole: K. Lewison, *The Interpretation of Contracts* (1989), at p. 124; *Chitty on Con tracts* (26th ed. 1989), vol. I, at p. 520. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *Chitty on Contracts, supra*, at p. 526; Lewison, *supra*, at p. 206; *Git v. Forbes* (1921), 62 S.C.R. 1, *per* Duff J. (as he then was), dissenting, at p. 10, rev'd [1922] 1 A.C. 256; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50 (S.C.C.), at p. 54. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleums Ltd.*, [1951] S.C.R. 154. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms

> – or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.[319]

Given the close context within which sections 17.02 and 17.03 are found in the Framework Agreement, we find it difficult to conceive that such apparently inconsistent provisions were included through inadvertence, as might have been understandable had these sections been in different parts of the agreement. We would have expected that the parties must have been aware of both provisions at the time they were included in the Framework Agreement and considered them to be complementary, or at least not in conflict.

For this reason, as directed in the *BG Checo* case, we have sought to find an interpretation that can reasonably give meaning to each of the terms in question. In respect of validation, we were able to do so by reading down section 17.03 to apply only in circumstances in which it would not create or expand rights in favour of the First Nation – that is, where the First Nation's validation could be said to be have been conferred independently by treaty and not solely on the basis of rights created or expanded by the Framework Agreement. In this context, we were able to conclude that section 17.03 could apply in some circumstances and not in others. However, in relation to settlement, we have been unable to find such an interpretation that would allow us to reach a similar conclusion, and we have therefore determined that we must find one of these sections to be ineffective.

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[319] *BG Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 SCR 12 at 23-24.

By stipulating the extension of the principles of settlement as set out in the Framework Agreement, section 17.03 clearly creates new rights for non–Entitlement Bands or extends their existing rights, which contravenes section 17.02. While we recognize that settlement is a product of negotiation, and that non–Entitlement Bands could conceivably achieve greater concessions than those won by the Entitlement Bands in the Framework Agreement, we must also acknowledge that the Framework Agreement itself represents a significant "head start" in the negotiation process that would not be enjoyed by a non–Entitlement Band in the absence of section 17.03.

Nevertheless, we consider that the only possible application of section 17.03 is to circumstances such as those in the present case, whereas section 17.02 appears to have the potential to apply to a broader range of situations than those at present before the Commission. We therefore view section 17.02 as the more general of the two provisions and have accordingly determined that the scope of section 17.02 does not extend to section 17.03.

The foregoing analysis speaks more to the question of the meaning to be given to section 17.03 than to the ability of a non–Entitlement Band like Kawacatoose to enforce that provision. The fact remains that Kawacatoose is not a party to the Framework Agreement and is not in a position to be able to require Canada and Saskatchewan to fulfil the terms of the section. We agree with Canada's submission that common law principles of privity of contract preclude the First Nation from enforcing section 17.03 directly as a matter of right.

We recognize that the parties to the Framework Agreement viewed it as a significant achievement in the settlement of treaty land entitlement issues in Saskatchewan and hoped that it would form the framework for the settlement of the

subsequently validated claims of non–Entitlement Bands. In this regard, we note the following evidence of Dr. Lloyd Barber relating to the purpose behind section 17.03:

> Q. The Article 17, particularly Article 17, you've indicated in your letter that it was inserted in the Framework Agreement at the entitlement bands' insistence; is that correct?
>
> A. Yeah. The politics of the Federation of Saskatchewan Indian Nations and the politics of the bands – I mean this in the small "P" sense, in the best sense of the term – is such that there is a very strong degree of collectivity. Now there's also some differences from time to time that erupt but essentially, deep down, there's a very powerful collectivity. And these guys didn't want to see some other bands left out if, in fact, they came along and got validated, they should, therefore, be part of this, nothing in this Framework Agreement should prejudice their position in any way. Likewise, there's a strong recognition of the sovereignty of each individual band and, therefore, an unwillingness on the part of the bands to bind each other. . . .
>
> Q. Was it – during the negotiations of the Framework Agreement was it being contemplated, especially towards the end, that this was going to be a Framework for the settlement of Treaty Land Entitlement in Saskatchewan?
>
> A. I think that's a fair characterization, but with the realization that you can't bind people who aren't signatories. But certainly, I think all parties thought that this was a pretty good agreement and that it should be clear that it can be applicable to those who come later.
>
> Q. Was that the intention of the parties by Article 17, to have the Framework Agreement apply to other bands?
>
> A. I think so.
>
> Q. If they chose to?

A. If they chose, yeah. As I said in that letter, I can't look into the minds of the negotiators for the government, but I think that they saw this as a kind of set of limiting parameters that they could always turn to and say, "Look, you can't come along and get more than the other guys got because look at the can of worms we have had to open this up." So in that general sense I think there was a suggestion in that, that here it is and this is the road that anyone who comes along subsequently should follow, because we've built a pretty good road here.

Q. So then was it the purpose and intent of Article 17.03, in particular, to ensure that all bands in Saskatchewan were dealt with in the same way?

A. I think it was, to the extent that that can be made to happen. I mean, I repeat, these are sovereign nations, if you like, first nations and so if one of them chooses not to be bound I guess he [sic] doesn't have to be, but there was an intention, as I say, to get people to recognize that this was a pretty good road and they should follow it.[320]

Mr. Kerby's evidence, although stemming from the initial assumption that section 17.03 is merely a bilateral agreement between Canada and Saskatchewan, is remarkably similar in its characterization of the objective behind that section:

> But in my view, 17.03 was there because Canada and Saskatchewan were acknowledging as between themselves, after a hard – I can attest to this – a hard-fought cost sharing agreement, that *they both wanted to ensure that if there was a substantiation of Treaty Land Entitlement with another Indian band on basically the same basis that was utilized for these 26 bands, that they, as between themselves, would support an extension of that cost sharing agreement and this agreement*, because

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320 ICC Transcript, May 24, 1995, pp. 142-45 (Lloyd Barber).

> there were benefits for both of them involved in this agreement and the cost sharing agreement.[321]

The evidence of Dr. Barber and Mr. Knoll that section 17.03 was inserted in the Framework Agreement on the motion of the Entitlement Bands was not challenged at this inquiry. We have no difficulty in concluding, therefore, that section 17.03 should be viewed as a benefit which was negotiated and won by the Entitlement Bands as a means of protecting the interests of non-Entitlement Bands in the settlement of future treaty land entitlement claims. In conclusion, we find that, although Kawacatoose is not a party to the Framework Agreement and is not entitled to enforce it directly, the Entitlement Bands as parties to that agreement would presumably be able to do so.

We do not agree with counsel for Canada that to apply section 17.03 of the Framework Agreement in the manner described above places non–Entitlement Bands in a superior position to Entitlement Bands that have not adhered to the Framework Agreement or executed Band Specific Agreements. We view the status of the non–Entitlement Bands prior to validation as being significantly inferior to the Entitlement Bands, since non–Entitlement Bands must still validate their treaty land entitlement claims – that is, they must still bring themselves within the Framework Agreement. Conversely, the Entitlement Bands are already within the ambit of the Framework Agreement and need merely to adhere to that agreement and to execute a Band Specific Agreement to bring their rights and obligations under the Framework Agreement into force. Entitlement Bands are also able to directly enforce the obligations of the other parties to the Framework Agreement.

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321 ICC Transcript, May 25, 1995, p. 214 (James Kerby). Emphasis added.

Once a non-Entitlement Band has been validated – and assuming that it has elected under section 17.04 to seek a settlement within the context of the Framework Agreement rather than on some alternative basis – the band would presumably still be required to adhere to the Framework Agreement and execute a Band Specific Agreement, with the time frames and other provisions of the Framework Agreement to apply, subject to such consequential amendments as may be required. We are not prepared to say that a non–Entitlement Band, upon validation, would automatically become an Entitlement Band, since, under section 17.04, it might not choose to follow that road to settlement. But should a validated non–Entitlement Band elect to bring itself within the Framework Agreement, we view section 17.03 as obliging Canada and Saskatchewan – even if that obligation is not directly enforceable by the non-Entitlement Band – to support the extension of the principles of that agreement and the Amended Cost Sharing Agreement to any subsequent settlement negotiations. As stated above, this means that Canada must negotiate in good faith and must insist upon Saskatchewan doing likewise. Even if a satisfactory settlement is not achieved following such good faith negotiations, the obligations of Canada and Saskatchewan pursuant to section 17.03 would nonetheless be satisfied.

PART V

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The Commission has been asked to examine and report on whether the Government of Canada properly rejected the specific claim submitted by the Kawacatoose First Nation. To determine whether the claim is valid, we have had to consider the following issues:

1 Are the two families who appear on the 1876 treaty paylist for Fort Walsh (Paahoska/Long Hair and Wui Chas te too tabe/Man That Runs) members of the Kawacatoose (Poor Man Band) First Nation or the Lean Man (Poor Man) First Nation?

2 Assuming, for the purposes of this inquiry, that the date-of-first-survey formula for determining outstanding treaty land entitlement is the appropriate formula to be applied and without prejudice to the position that other formulas are applicable under the terms of Treaty 4, does the First Nation have an outstanding treaty land entitlement on the basis that the additions (new adherents, landless transfers, and marriages to non-treaty women) to the First Nation after the First Nation's date of first survey:

(a) are entitled to land under the terms of Treaty 4; and/or

(b) are to be counted in establishing the First Nation's date-of-first-survey population to determine if the First Nation has an outstanding treaty land entitlement?

3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands which are party to the Framework Agreement?

Our findings with regard to each issue are summarized as follows:

Issue 1: Kawacatoose's Date-of-First-Survey Population

The 13 members of the two families paid at Fort Walsh in 1876 under the heading "Poor Man" were members of Kawacatoose and not the Assiniboine Poor Man Band. However, all five individuals in the Contourier family who in 1883 were paid arrears for 1876 with Kawacatoose, must be treated as members of the Gordon Band, since three members of the family were listed on the Gordon Band's 1875 base paylist, and at least one of the other two appears to be a descendant born in 1876. As a result, we have concluded that the DOFS population for Kawacatoose should be 210, subject to further research that may be undertaken to confirm the membership in the First Nation of the fourth member of the Keeahkeewaypew family.

Issue 2: Nature and Extent of Treaty Land Entitlement

The Commission generally affirms and adopts by reference its conclusions and recommendations from the Fort McKay Report. However, we also clarified two of the findings made in that report:

- Although Treaty 8 refers to the option of an Indian receiving land in severalty whereas Treaty 4 does not, we do not view this difference as affecting our general conclusions regarding treaty land entitlement.

- With respect to landless transfers, once the individual joins a band that has received treaty land to some extent, the right to be counted should then crystallize and become part of the collective right of that band. Until that time, the treaty land entitlement remains with the individual pending his or her being counted with a band that has never received treaty land entitlement or joining a band that has received such entitlement. A landless transfer must then be a transfer from a landless band.

We found that the material provisions of Treaty 4 are very similar in intent to the parallel terms of Treaty 8. Although the factual circumstances of the Kawacatoose and the Fort McKay First Nations differed somewhat, we nevertheless concluded that they were very much alike in certain respects: bands under both Treaty 4 and Treaty 8 had not become stable, self-contained units, and it was recognized at the time of treaty that many Indians would not settle onto reserves and convert to an agrarian-based economy for some time to come. For these reasons, we cannot reasonably conclude that the members of Kawacatoose, any more than the other signatories of Treaty 4, would have been prepared to cede their rights to the vast areas of land contemplated by the treaty on the basis of the rigid DOFS population approach which Canada has argued represents its lawful obligation.

Based on the principles outlined in the Fort McKay inquiry, Canada has not satisfied its treaty obligation to provide reserve land to the Kawacatoose First Nation. The treaty conferred upon each Indian an entitlement to land as a member of a band, with entitlement crystallizing at the date of first survey in 1876 for those individuals who were members of the band at that time. The quantum of land to which Kawacatoose was entitled in that first survey is a question of fact, determined on the basis of the actual band membership, including band members who were absent or received arrears, on the date of first survey. The DOFS population was 159 – including the 13 members of the two Fort Walsh families, but excluding the five members of the Contourier family – plus 51 absentees and arrears, for a total of 210.

The treaty also conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the date of first survey. The quantum of additional land to which Kawacatoose is entitled as a result of such new adherents is likewise a question of fact, determined on

the basis that the entitlement crystallized when those Indians joined the band. We conclude that a total of 43 individuals joined Kawacatoose as new adherents to treaty following the date of first survey, but, since neither party has expressed complete confidence in the numbers submitted by them or researched on their behalf, this figure is subject to such further research as the parties may agree to undertake to confirm or amend it.

In addition, the treaty conferred upon the First Nation the entitlement to receive additional reserve land for every Indian who transferred from one band to another, where the band from which that Indian transferred had never received land. There were 19 landless transfers to Kawacatoose, although this number is again subject to further research for confirmation or amendment.

Finally, as a result of marriages, five women who were new adherents or landless transfers in their own right became members of Kawacatoose. As with the preceding two figures for new adherents and landless transfers, this number is also subject to review if the parties should agree to do so.

As a result, we have concluded on a preliminary basis that the First Nation's treaty land entitlement claim, including individuals on the base paylist, absentees and arrears, new adherents, and landless transfers, should be as follows:

1876 base paylist	146
Fort Walsh families	13
Contourier family	0
Absentees and arrears	51
New adherents	43
Landless transfers	19
Eligible in-marrying non-treaty women	5
TOTAL	**277**

This figure gives rise to a treaty land entitlement of 35,456 acres. When the first survey area of 27,200 acres is set off against this treaty land entitlement, the result is that the Kawacatoose First Nation is owed an additional 8526 acres, or 13.32 square miles.

Issue 3: Saskatchewan Framework Agreement

While the Commission has determined that the Framework Agreement does not give non–Entitlement Bands an independent basis for validation, we nevertheless conclude that Kawacatoose has substantiated its claim for outstanding treaty land entitlement on the same basis as the Entitlement Bands – that is, in accordance with the terms of Treaty 4. We did not agree with the First Nation's submissions that the terms of section 17.03 of the Framework Agreement impose a fiduciary or contractual obligation upon Canada to accept the Kawacatoose claim for negotiation, or that Canada is estopped from denying an obligation to validate that claim.

Even so, once substantiation of the claim of a non–Entitlement Band has occurred, as in the present case, section 17.03 applies, stipulating that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Framework Agreement to that band. This was acknowledged by both the solicitor who negotiated the Framework Agreement on Canada's behalf as well as present counsel for Canada. Although Kawacatoose is not a party to the Framework Agreement and is not in a position to enforce the obligations of Canada and Saskatchewan under section 17.03, we take from Canada's submissions regarding the high degree of importance which it attaches to its obligations under the Framework Agreement that it will consider itself honour-bound to fulfil the obligations to non–Entitlement Bands set forth in section 17.03. Should Canada fail to live up to its obligations in that section, we expect that the Entitlement Bands, as the parties who sought and obtained that contractual

term, would be able to enforce the provision, and we note that those bands have already endorsed a resolution in support of Kawacatoose and other First Nations with outstanding treaty land entitlement claims.

We recognize that section 17.03 of the Framework Agreement appears to be inconsistent with section 17.02, but we have concluded that, since section 17.02 is the more general of the two provisions, its scope should be interpreted as not extending to the subject matter of section 17.03.

RECOMMENDATIONS

Having found that the land entitlement of the Kawacatoose First Nation has not been fully satisfied in accordance with the terms of Treaty 4, we therefore make the following recommendations:

1 **That the treaty land entitlement claim of the Kawacatoose First Nation be accepted for negotiation under Canada's Specific Claims Policy.**

2 **In accordance with section 17.03 of the Saskatchewan Framework Agreement, that Canada and Saskatchewan support the extension of the principles of settlement contained in that agreement to the Kawacatoose First Nation in order to fulfil the outstanding treaty land entitlement obligations to the First Nation.**

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC
Commission Co-Chair

Roger J. Augustine
Commissioner

APPENDIX A

KAWACATOOSE FIRST NATION INQUIRY

1. **Decision to conduct inquiry** — May 6 and 7, 1994

2. **Notices sent to parties** — May 17, 1994

3. **Planning conference** — Saskatoon, July 8, 1994

4. **Community and expert sessions**

The panel held the following community and expert sessions:

(a) *November 15, 1994*: The panel held a community session at Raymore, Saskatchewan, hearing from the Chief and five Elders of the Kawacatoose First Nation and four additional witnesses as follows:

- Chief Richard Poorman
- Elders Elsie Machiskinic (Poorman), Pat Machiskinic, Fred Poorman, John Kay and Alec Kay
- Panel of research experts from the Office of the Treaty Commissioner: Howard McMaster, Peggy Brizinski, Jamie Benson and Marion Dinwoodie

(b) *November 18, 1994*: In a joint session in Calgary, Alberta, which included representatives from the Fort McKay First Nation, the panel heard from Sean Kennedy, private consultant to Indian organizations and bands and formerly a member of the Specific Claims Branch, Department of Indian Affairs and Northern Development.

(c) *December 16, 1994*: In a joint session in Ottawa, Ontario, which again included representatives from the Fort McKay First Nation, the panel heard from Rem Westland, Director General, Specific Claims Branch, Department of Indian Affairs and Northern Development.

(d) *May 24-25, 1995*: The panel held joint sessions in Saskatoon, Saskatchewan with representatives from the Kahkewistahaw and Ocean Man First Nations, hearing from the following witnesses:

- Kenneth Tyler, Counsel, Constitutional Law Branch, Manitoba Department of Justice
- David Knoll, Counsel, Federation of Saskatchewan Indian Nations
- Dr. Lloyd Barber, chief negotiator for Federation of Saskatchewan Indian

Nations for the purpose of negotiating the Saskatchewan Framework Agreement
- James Gallo, Manager, Treaty Land Entitlement and Claims, Lands and Trusts Services, Department of Indian Affairs and Northern Development
- James Kerby, legal counsel to Canada for the purpose of negotiating the Saskatchewan Framework Agreement
- Panel of research experts from the Office of the Treaty Commissioner: Jamie Benson and Peggy Brizinski

5. **Oral submissions: Saskatoon** October 24, 1995

6. **Content of formal record**

The formal record for the Kawacatoose First Nation Inquiry consists of the following materials:

- 34 exhibits tendered during the Inquiry, including the documentary record (3 volumes of documents with annotated index, and 2-volume addendum with index)
- Transcripts from community sessions (5 volumes)
- Written submissions of counsel for Canada and the claimants
- Transcripts of oral submissions (1 volume)
- Authorities and supplemental authorities submitted by counsel with their written submissions
- Correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.